NOTES AND COMMENTS

PROSPECTIVE OVERRULING AND RETROACTIVE APPLICATION IN THE FEDERAL COURTS

OLIVER WENDELL HOLMES, JR., author of *The Common Law*, was speaking as Mr. Justice Holmes of the United States Supreme Court when in 1910 he wrote, "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."[1] There is a certain grandeur in the sweep of Holmes' phrasing, but the statement remains a fair description of one of the central principles in our received learning on the common law.

THE ROOTS OF RETROACTIVITY

However distant may be the origin of the principle that judicial decisions are of their nature retrospective,[2] its more recent influence must be traced to Blackstone, whose *Commentaries* provided the classic formulation and made clear its intellectual justification.[3] Blackstone's argument may be stated simply. The duty of a court, he said, is not to "pronounce a new law, but to maintain and expound the old one."[4] Consequently, in deciding a case, a judge is bound to *find* the law as it existed when the controversy arose and to *declare* it as being the controlling principle in the case.[5]

From the declaratory nature of a judicial decision, Blackstone derived the necessity that the decision have retrospective effect. If the decision interpreted a law, then it did no more than declare what the law had always been. If

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1. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (dissenting opinion).

2. In an important book first published in 1713, ten years before Blackstone was born, Sir Matthew Hale had written:

> The decisions of courts of justice . . . do not make a law properly so called for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is . . . . And though such decisions are less than a law, yet they are a greater evidence thereof, than the opinion of any private persons, *as such*, whatsoever.

HALE, HISTORY OF THE COMMON LAW 141 (5th ed. 1794). The passage is discussed in GRAY, THE NATURE AND SOURCES OF THE LAW 218-19 (2d ed. 1921).

3. See GRAY, *op. cit. supra* note 2, at 218-24. *Cf.* Carter Oil Co. v. Weil, 209 Ark. 653, 658-59, 192 S.W.2d 215, 218 (1946).

4. 1 BLACKSTONE, COMMENTARIES 69 (1769).

5. As Gray explained the system:

> The Law, indeed, is identical with the rules laid down by the judges, but those rules are laid down by the judges because they are law, they are not the Law be-

subsequently it became necessary to overrule this first interpretation, it was equally clear to Blackstone that the overruling decision also did no more than declare the law—albeit in a more enlightened manner. In the diction which Blackstone was fond of using, the first decision had been merely an "evidence" of the law—and as it subsequently developed, an erroneous evidence.[6] Once it was postulated that courts must limit themselves to finding and declaring the law, the necessity of retroactive application of overruling decisions easily followed.[7] In a famous passage, Blackstone said:

> These judicial decisions are the principal and the most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law . . . . Yet this rule admits of exceptions where the former determination is most evidently contrary to reason . . . . But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not* law; that is, that it is not the established custom of the realm, as had been erroneously determined.[8]

> cause they are laid down by the judges; or . . . the judges are the discoverers, not the creators, of the Law.

GRAY, *op. cit. supra* note 2, at 93.

6. As Dean Shulman expressed it:

> The doctrinal reasons are that courts do not "pass" laws, but merely "apply" them to specific cases; that the overruled decision was a mistake as to the law and consequently never was the law; that the overruling decisions is not a new law but the application of what is, and therefore had been, the true law.

Shulman, *Retroactive Legislation*, 13 ENCYC. SOC. SCI. 355, 356 (1934).

See, *e.g.*, Legg's Estate v. Commissioner, 114 F.2d 760 (4th Cir. 1940) ("Decisions are mere evidences of the law, not the law itself; and an overruling decision is not a change of law but a mere correction of an erroneous interpretation." *Id.* at 764).

The same language has been used in cases involving a change in administrative regulations issued under a statute. See, *e.g.*, Howard Pore, Inc. v. Nims, 322 Mich. 49, 73, 33 N.W.2d 657, 667 (1948). For a discussion of "retroactive interpretative rules," see 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.09 (1958).

7. A statement of the "inexorable logic" underlying this theory is given by Professor Davis:

> If an interpretative rule is merely an interpretation of a statute, and if the meaning of the statute has been there from the time of its original enactment, then no problem of a retroactive interpretative rule can arise, for either the interpretative rule expresses the true meaning of the statute or it does not; if it does, then that is what the statute has always meant and the rule has not changed the law retroactively; if it does not, then it does not matter whether the rule can be made retroactive, for the rule is invalid in that it is inconsistent with the statute.

DAVIS, *op. cit. supra* note 6, at § 5.09. See Note, 32 MICH. L. REV. 1009 (1934). See also 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 748 (rev. ed. 1937) ("However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court.").

8. 1 BLACKSTONE, COMMENTARIES 68-71 (1769), quoted in GRAY, *op. cit. supra* note 2, at 219-20.

If the law had always been what the most recent judicial decision declared it to be, the possibility existed that a man's actions could be judged by a standard not yet judicially discovered at the time the actions took place. It was therefore urged that retroactive application of a judicial decision, when attempted in the United States, was limited by Article I, section 10 of the Constitution, which provides that "No State . . . shall pass any *ex post facto* law, or law impairing the obligation of contracts."[9] But this view was consistently rejected. The provision, "according to the natural import of its terms, is a restraint upon legislative power and concerns the making of laws, not their construction by the courts." So summarized the United States Supreme Court in *Ross v. Oregon*,[10] rejecting the contention that a state judicial decision which put an unexpected construction on a newly-enacted statute violated the *ex post facto* clause. In *Frank v. Mangum*,[11] the Court rejected the allied contention that the *ex post facto* clause is violated by a judicial decision which overrules or is inconsistent with a prior decision.[12] And the same rationale was applied to the prohibition against the impairment of contract obligations: the act of impairment must be a legislative act. Thus, in *Tidal Oil Co. v. Flanagan*[13] the Court found no impairment in "the mere fact that the state court reversed a former decision to the prejudice of one party."[14]

It should not be assumed, however, that retroactive application of a judicial decision will always be constitutionally permissible. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*[15] the taxpayer-company brought suit in a state court of Missouri to enjoin collection of a state tax on the ground that discriminatory assessment of the tax violated the due process clause of the fourteenth amendment. The state courts had repeatedly held, beginning with the *Laclede* case,[16] that under the relevant state statute a suit in equity was the only remedy open to a taxpayer wishing to contest the validity of an assessment; the possibility of a prior appeal to the State Tax Commission had been termed "preposterous" and "unthinkable" by the courts.[17] Consequently, "no one doubted the authority of the *Laclede* case until it was expressly overruled in the case at bar,"[18] in which the Missouri Supreme Court discovered that the

9. The federal government is prohibited from passing an ex post facto law by Art. I, § 9 of the Constitution.

10. 227 U.S. 150, 161 (1913). See also Calder v. Bull, 3 U.S. (3 Dall.) 385 (1798); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810). *Cf.* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

11. 237 U.S. 309 (1915).

12. *Cf.* Central Land Co. v. Laidley, 159 U.S. 103 (1895); Tidal Oil Co. v. Flanagan, 263 U.S. 444, 450 (1924); Fleming v. Fleming, 264 U.S. 29 (1924).

13. 263 U.S. 444 (1924).

14. *Id.* at 450. See also Fleming v. Fleming, 264 U.S. 29 (1924).

15. 281 U.S. 673 (1930).

16. Laclede Land & Improvement Co. v. State Tax Comm'n, 295 Mo. 298 (1922).

17. See 281 U.S. at 676.

18. *Id.* at 677.

appropriate remedy was in fact an appeal to the State Tax Commission. It further held that because the period of limitations for appeal to the Commission had run, and because the company was guilty of laches in not prosecuting such an appeal, its bill for equitable relief had to be dismissed.

Speaking through Justice Brandeis, the Supreme Court held that the retroactive application of the overruling decision, when taken in combination with the period of limitations, had the effect of denying the company "due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right"[19] to be taxed on a nondiscriminatory basis. An appeal to the State Tax Commission before *Laclede* was reversed would have been "entirely futile," the Court said, and an appeal to the Commission after *Laclede* was reversed was barred by the period of limitations. Thus, although the state court's decision to give retroactive effect to the holding in the overruling case—involving no more than "a retroactive change in the law of remedies"[20]—was not in itself unconstitutional, it became so when, in combination with the period of limitations, its effect was to preclude the company from ever being heard on its claim.

Constitutional problems might also be presented, as Mr. Justice Black pointed out in his opinion in *James v. United States*,[21] by retroactive application of an overruling decision which reinterprets a criminal statute and, in effect, announces "the creation of a judicial crime."[22] Application of the overruling decision to acts done during the intervening period might violate the defendant's right to fair notice and render the statute unconstitutionally vague during that intervening period.[23]

But the fact that courts upheld retroactive application of judicial decisions against attack on constitutional grounds did not end the matter. It only signalled a shift of the attack to policy grounds. At least three results of the practice of making judicial decisions retroactive—even if the practice be constitutionally permissible—were said to be deleterious to the creative growth of an equitable legal system. First, retroactive overruling worked unfair surprise on persons who had justifiably relied upon judicial decisions, thereby "frustrat[ing] the reasonable expectations of well-intentioned men."[24] Second, the knowledge that the frustration of such expectations was a necessary consequence of overruling a prior decision served to inhibit the judicial overruling of precedents which were outworn and outmoded, thereby perpetuating the life of obsolescent legal rules.[25] And third, adherence to the rule of retro-

19. *Id.* at 678.

20. *Id.* at 681.

21. 366 U.S. 213, 222 (1961).

22. *Id.* at 224.

23. See note 124 *infra.*

24. Cardozo, *Address Before N.Y. State Bar Association*, 55 REP. N.Y. STATE BAR ASS'N 263, 294 (Jan. 22, 1932).

25. See, *e.g.*, Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950) (and particularly dissent by Vanderbilt, C.J., *id.* at 14, 21-28, 76 A.2d at 878, 882-85); Crowley v. Lewis, 239 N.Y. 264,

active overruling obscured in "the murky shadow of Blackstonian jurisprudence" the important teachings of the Legal Realists that judges as much as legislators exercise an "ineluctable lawcreating function,"[26] thereby discouraging open and honest analysis of what courts do in fact.[27]

Having stated their objections to the practice of retroactive overruling, the critics of the Blackstonian view proposed prospective overruling as the remedy.[28] Briefly stated, prospective overruling is the judicial technique by which a court—eager to overrule an outmoded precedent but reluctant to disappoint the expectations of the parties—applies that precedent in deciding the particular case before it but simultaneously announces that it shall consider the precedent as overruled in all future cases.[29] Justice Cardozo, the major advocate of prospective overruling,[30] gave the following as a "fair paraphrase"[31] of the doctrine:

266-67 (1925); Lombardo v. Adams, 12 Misc. 2d 589, 593-95, 172 N.Y.S.2d 271, 274-76 (Sup. Ct. 1958). *Cf.* Helvering v. Griffiths, 318 U.S. 371, 402 (1943); Bailey v. Richardson, 182 F.2d 46, 56-58 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951).

26. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2, 6 (1960). See Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

27. See, *e.g.*, FRANK, COURTS ON TRIAL (1949); FRANK, LAW AND THE MODERN MIND (1930); LLEWELLYN, THE BRAMBLE BUSH (1930).

28. The earliest proposals include Canfield, *Speech to South Carolina Bar Association*, REP. S.C. BAR ASS'N 17-19, 20-21 (1917); Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 606 (1917); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230, 250-51 (1918); WIGMORE, PROBLEMS OF LAW 79-82 (1920). The first major attack came from Chief Justice von Moschzisker of the Supreme Court of Pennsylvania. Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426-27 (1924). See also Note, 47 HARV. L. REV. 1403, 1412 (1934).

29. See Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B. A.J. 180, 182 (1931); Kocourek & Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 995-96 (1935); Covington, *The American Doctrine of Stare Decisis*, 24 TEXAS L. REV. 190, 203 (1946); Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEXAS L. REV. 514 (1943); Comment, 25 VA. L. REV. 210 (1938); Note, 60 HARV. L. REV. 437 (1947). *Cf.* Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940).

30. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142-67 (1921); Cardozo, *Address Before N.Y. State Bar Association*, 55 REP. N.Y. STATE BAR ASS'N 263, 294-96 (Jan. 22, 1932); Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932) (Cardozo, J.). *Cf.* LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 109-11 (1938).

It has been suggested that Cardozo's "recurrent interest" in developing methods to avoid retroactive application of newly-announced rules stemmed from the injustice he felt when Columbia Law School increased the length of its prescribed course to three years after he had entered at a time when the required course was only two years. Cardozo did not finish the three-year course and never received his degree. See Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 10 n.31 (1960).

31. Cardozo, *Address*, *supra* note 30, at 296.

> The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the [judicial] repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril.[32]

Hence, the crucial operative effect of the doctrine is that it allows a court to have its cake and eat it too—to overrule an outmoded precedent without having to disappoint the justified expectations of anyone.[33]

NON-BLACKSTONIAN RETROACTIVITY

Although prospective overruling might alleviate certain defects of Blackstonian retroactivity, it would not provide a complete remedy. For it has long been held that if there is a change in either the statutory or decisional law before final judgment is entered, the appellate court must "dispose of [the] case according to the law as it exists at the time of final judgment, and not as it existed at the time of the appeal."[34] This rule is usually regarded as being founded upon the conceptual inability of a court to enforce that which is no longer the law, even though it may have been the law at the time of trial, or at the time of the prior appellate proceedings. Thus, treaties, statutes, constitutional amendments, and judicial decisions will often have decisive implications for events already concluded at the time of their effective date.

The authoritative American statement of the rule was made by Chief Justice Marshall in *United States v. Schooner Peggy*:[35]

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation . . . . In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.[36]

That *Schooner Peggy* need not have been applied so broadly, however, seems clear from its facts. The schooner Peggy was a French trading vessel that

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32. *Ibid.*

33. For a statement that prospective overruling "has made great headway, and assumed substantial importance" in recent decades, see HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 620 (Tent. ed. 1958). For the less enthusiastic view that prospective overruling has failed "to emerge as a standard appellate device," see Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960). For a policy argument against prospective overruling, see note 192 *infra*.

34. Montague v. Maryland, 54 Md. 481, 483 (1880).

35. 5 U.S. (1 Cranch) 102 (1801).

36. *Id.* at 108-10.

had been run ashore and captured by the United States ship Trumbull, acting under orders of the President to seize any armed French vessel found on the high seas. An order of condemnation was entered on September 23, 1800. A week later, while the case was pending before the Supreme Court, the United States signed a convention with France providing in part that "property captured, and not yet definitively condemned . . . shall be mutually restored."[37] The Court held that it was bound to follow the treaty and order the judgment of condemnation set aside, even though it was not erroneous when delivered by the lower court. It reached this decision by reading "definitively" to mean "having no further possibility of appeal or judicial review."[38]

Two considerations, decisive in the literal sense, stand out. First, the treaty that intervened before final judgment was by its terms framed to be retroactive and to reach all prior lower court condemnations not yet decided on appeal. The rule of *Schooner Peggy*—that a change in governing law before entry of final judgment must be applied by an appellate court—would seem, therefore, to be based upon the precise command of retroactive application made by the treaty that the Court was construing. It would not seem to be based upon any general principles of jurisprudence applicable whether the intervening change in law provided for retroactivity or not. Second, *Schooner Peggy*, as Chief Justice Marshall carefully pointed out, was not a "mere private [case] between individuals"; rather, it involved "great national concerns" and had important foreign policy implications.[39] To find retroactivity necessary in such comparatively delicate circumstances might not inevitably require finding it necessary in circumstances less charged with national and international significance. These two considerations have not been thought in subsequent cases to qualify Marshall's broad language, however; as a result, newly-announced law has been applied retroactively in a variety of circumstances quite unlike those present in *Schooner Peggy*.

Schooner Peggy was concerned with a change made in the positive law by treaty. But changes in the positive law can also be made by statute. For example, in *Carpenter v. Wabash Railway Co.*,[40] the plaintiff was denied the right to intervene in an equity receivership proceeding involving the railroad; the denial was affirmed by the Court of Appeals. Three weeks after the petition for certiorari had been filed in the United States Supreme Court, but before it had been acted upon, Congress amended the relevant statute to authorize intervention by those in petitioner's position. After granting certiorari, the Supreme Court assumed without deciding "that the determination of the court below was correct upon the record before it and in the light of the law as it then stood." But, it added, "it is our duty to consider the amended

37. *Id.* at 107.

38. *Id.* at 108.

39. *Id.* at 110.

40. 309 U.S. 23 (1940).

statute and to decide the question in harmony with its provisions,"[41] quoting *Schooner Peggy*'s language. The judgment denying petitioner the right to intervene was vacated and the district court was directed "to allow petitioner's claim in accordance with the statutory provision,"[42] although the effect of the decision was admittedly to grant the petitioner a statutory right under a statute which did not exist at the time he originally asserted it.[43]

In *Vance v. Rankin*,[44] to cite another example, the plaintiffs succeeded in obtaining a writ of mandamus to compel town officials to take action made mandatory by statute. The appellate court affirmed. While the appeal was pending before the Supreme Court of Illinois, the state legislature amended the statute to make the action in question discretionary rather than mandatory. Since there now was no statute in force requiring the town officials to act, the state supreme court reversed the judgment and dissolved the writ of mandamus, thus denying the plaintiff a statutory right that existed at the time he asserted it.

Changes in the positive law before final judgment may also be made by constitutional amendment. A clear-cut illustration of the effect of such a change upon pending litigation is provided by *United States v. Chambers*,[45] a criminal prosecution[46] under the National Prohibition Act. The two defendants, Chambers and Gibson, were indicted on June 5, 1933. Chambers pleaded guilty, and judgment was postponed until the December term. On December 5, 1933, the twenty-first amendment, which repealed the eighteenth amendment, became effective. The cases of Chambers and Gibson, who had not yet pleaded, were called on December 6, 1933. The Supreme Court affirmed dismissal of the indictments on the ground that when "a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions . . . ."[47] Accordingly, any prosecutions begun before

41. *Id.* at 26-27.

42. *Id.* at 30.

43. *Contra,* Concordia Ins. Co. v. School Dist., 282 U.S. 545 (1931).

44. 194 Ill. 625, 62 N.E. 807 (1902).

45. 291 U.S. 217 (1934).

46. Because this was a criminal prosecution, it builds not only upon the cases which followed *Schooner Peggy* but also upon the principle, established at common law, that repeal of a penal statute prohibits prosecution of acts committed before the repeal if those acts had not yet been prosecuted to final judgment. The repeal is regarded as an indication that the state no longer wants such acts punished, regardless of when they took place, and no longer views them as criminal. Annot., 89 A.L.R. 1514 (1934). The retroactivity which results from application of this principle may reflect the strict interpretation by which criminal statutes are traditionally construed. In situations in which the federal "saving" statute, 1 U.S.C. § 109 (1958), is applicable, however, prosecutions begun before repeal could be continued. The statute provides that repeal of a federal statute shall not release prior penalties or liabilities incurred prior to repeal, "unless the repealing act shall so expressly provide." The Court found the statute inapplicable in *Chambers*. See 291 U.S. 217, 224 (1934).

47. 291 U.S. at 223.

repeal may not be continued after repeal, even though the acts listed in the indictment were criminal when done.[48]

Changes in the controlling law before final judgment is entered may also be made by judicial decisions which reverse, qualify, limit, or reinterpret prior judicial decisions. For example, in *Vandenbark v. Owens-Illinois Glass Co.*,[49] plaintiff instituted a diversity action in federal court alleging that she had contracted silicosis through the negligence of the defendant, her employer. The trial court dismissed the complaint on the ground that the law of Ohio, the governing state, did not permit recovery for such a disease. The Court of Appeals affirmed. After the trial court had dismissed the complaint, the Ohio Supreme Court reversed its former decisions and expressly ruled that silicosis was a compensable illness under Ohio common law. The United States Supreme Court granted certiorari and reversed; it ruled that the doctrine of *Erie v. Tompkins* must be read to incorporate, in effect, the doctrine of *Schooner Peggy*. A federal court sitting in a diversity case must therefore apply the most recent state court decision, even if it came after the operative events or the entry of judgment by a lower court. "Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered."[50]

The *Vandenbark* Court's commentary upon *Schooner Peggy* is interesting because of its awareness of the factual context of the original decision. The Court noted that *Schooner Peggy* involved a treaty, not a judicial decision, and that it involved high national interests, rather than private parties. After acknowledging the existence of these limiting factors, however, the Court adopted a broad interpretation, observing quite correctly that "the principle quoted has found wide acceptance in a variety of situations."[51]

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48. *But cf.* Swank v. Tyndall, 226 Ind. 204, 78 N.E.2d 535 (1948) (civil); Rix v. Asadoorian, 171 A.2d 925 (N.H. 1961) (civil), holding that an amendment to the state constitution restricting trial by jury in civil cases to actions involving $500 or more is not applicable to an action in progress which involved less than $500. The court said:

> At the time the defendant requested trial by jury . . . the amendment had not taken effect and the defendant was entitled to trial by jury as it formerly existed . . . .

171 A.2d at 927.

49. 311 U.S. 538 (1941).

50. *Id.* at 543. See also Johnson v. Cadillac Motor Co., 261 Fed. 878 (2d Cir. 1919), commented on in CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 158-60 (1921).

51. 311 U.S. 538, 542 (1941). The result in *Vandenbark* was extended one stage further procedurally when the Court of Appeals for the Sixth Circuit followed on rehearing a state supreme court decision reversing the state rule which the circuit court had previously applied to the case. Doggrell v. Southern Box Co., 208 F.2d 310 (6th Cir. 1953).

Once a final judgment has been entered, the pressures toward an end to litigation which are embodied in the principle of res judicata diminish the possibility that a subsequent change in the law will be applied retroactively. But a party still has available the right to seek a petition for a writ of habeas corpus and, in the federal courts, the right to make a motion under Federal Rule of Civil Procedure 60(b) for relief from a final judgment. See 7 MOORE, FEDERAL PRACTICE ¶ 60 (2d ed. 1955). For the relevance of an aspect of posture —failure to appeal—to the availability of habeas corpus, *compare* Sunal v. Large, 332 U.S.

THE RETREAT FROM RETROACTIVITY

The compelling influence of Blackstone upon the early American judiciary resulted in repeated recitation of the declaratory nature of law. Courts consistently announced that judicial decisions, particularly overruling decisions, must be retroactive; the requirement of retroactivity was seen as a necessary consequence of the theory, jealously adhered to, that a court's power was limited to declaring pre-existent law and did not extend to the making of new law. But it gradually became clear that the declaratory theory was too rarefied to permit just application in many cases. Logomachy, to paraphrase Dean Shulman, too often triumphed over wisdom and substance.[52] It thus became necessary for courts to develop judicial methods which more closely approached the achievement of substantial justice by respecting *bona fide* expectations.

The Legislative Divorce Cases

One example of an area in which nineteenth century courts were moved to apply their decisions prospectively was that involving direct or collateral attack upon the validity of legislative divorces. Fifty years ago the granting of divorces by the passage of a special legislative act was still considered appropriate in some states; it had enjoyed wide acceptance earlier.[53] If the power of a legislature to grant divorces was terminated by legislation or a constitutional amendment, all previously-granted legislative divorces were presumably valid. But when the power was terminated by a judicial decision that the power had not existed in the legislature *ab initio,* the validity of existing legislative divorces was called into uncomfortable question. To make such a ruling retroactive would be to upset the basis of fundamental social arrangements and to change the status of innocent men, women, and children. Although the cases make for quaint reading today, their importance to the parties was more than historical.

A typical case was *Bingham v. Miller,*[54] decided by the Supreme Court of Ohio in 1848. The plaintiff brought an action in assumpsit. The defendant introduced evidence that she had been lawfully married and contended, therefore, that under the rule disabling married women from entering contracts, her husband was the only proper defendant. The plaintiff countered by introducing evidence of a legislative divorce granted to her husband. If the divorce were valid, the wife would be the appropriate defendant. The wife,

174 (1947), *with* Estep v. United States, 327 U.S. 114 (1946). See also Polites v. United States, 364 U.S. 426 (1960); Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

52. See Shulman, *Retroactive Legislation,* 13 ENCYC. SOC. SCI. 356-57 (1934).

53. See, *e.g.,* Maynard v. Hill, 125 U.S. 190, 206-09 (1888); Noel v. Ewing, 9 Ind. 37, 53 (1857) (citing statistics); Starr v. Pease, 8 Conn. 540 (1831); Baldwin, *Legislative Divorces and the Fourteenth Amendment,* 27 HARV. L. REV. 699 (1914).

54. See 17 Ohio 445 (1848). See, *e.g.,* MADDEN, PERSONS AND DOMESTIC RELATIONS 256-61 (1931); JACOBS & GOEBEL, DOMESTIC RELATIONS 380 (3d ed. 1952). *Compare* Richeson v. Simmons, 47 Mo. 20 (1870), *with* Winkles v. Powell, 173 Ala. 46, 55 So. 536 (1911).

therefore, contended that the legislative divorce was void as beyond the power of the legislature to grant and that in legal contemplation she remained a married woman. The court refused to charge the jury that the divorce was invalid, and the defendant assigned the refusal as error. The state supreme court held that although the legislature had "assumed and exercised this power [to grant divorces] for a period of more than forty years,"[55] it had done so by encroaching upon a judicial power in violation of the state constitution; the legislature had never had the power to grant divorces.

Strictly, it should follow that the defendant's divorce was invalid, that her husband was the only appropriate defendant, and that the plaintiff's action must be dismissed. The court refused to bend to such strictness, however. It said:

> To deny this long exercised power, and declare all the consequences resulting from it void, is pregnant with fearful consequences. If it affected only the rights of property, we should not hesitate; but second marriages have been contracted, and children born, and it would bastardize all of these, although born under the sanction of apparent wedlock, authorized by an act of the Legislature before they were born, and in consequence of which the relation was formed which gave them birth. On account of these children, and for them only, we hesitate. And in view of this, we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the Legislature, is unwarranted and unconstitutional . . . .
>
> We trust we have said enough to vindicate the constitution, and feel confident that no department of State has any disposition to violate it, and that the evil will cease.[56]

The court therefore affirmed the trial court's refusal to charge that the divorce was invalid. The effect of the decision was that while no more legislative divorces could be granted, those already granted would be respected, even though the legislature had lacked power to grant them. The opinion demonstrates that the dogmas and shibboleths of necessary retroactivity will not always be followed when to do so would deny justice without any compensating gain beyond the preservation of a fiction.

The Municipal Bond Cases

An example of the growth of a similar technique is provided by the series of municipal bond cases which came before the United States Supreme Court in the second half of the nineteenth century. The facts in *Gelpcke v. Dubuque*,[57] the first and most important of the cases, represent a pattern found in all the others. The Supreme Court of Iowa repeatedly had held that the legislature had the power to authorize municipalities to issue bonds to aid in the construction of railroads. After the city of Dubuque had issued bonds under

55. 17 Ohio at 448.

56. *Id.* at 448-49.

57. 68 U.S. (1 Wall.) 175 (1863). See Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311 (1891); Read, *The Rule in Gelpcke v. Dubuque*, 9 AM. L. REV. 381, 397 (1875).

an authorizing statute, the state supreme court reversed itself and held that the legislature lacked the power to authorize such bond issues. When the city refused to make a payment due upon bonds that he held, Gelpcke brought suit in a federal court in Iowa. It was clear that if he had brought his action in a state court, Gelpcke would have lost; the state court would have applied the most recent decision in the area and ruled that because the legislature lacked the power to authorize bond issues of the type in question, the authorizing statute had never been the law, and the bonds were therefore never valid obligations of the city. Indeed, Gelpcke had every reason to expect the same result in the federal court. For even under the doctrine of *Swift v. Tyson*,[58] a federal court sitting in a diversity case would usually follow a state court's interpretation of a state constitutional provision or statute; construction of such local law was not considered to be a part of that general common law which a federal court could "make" (or was it "find"?) for itself.[59] Even in *Gelpcke* the Supreme Court was "not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of State courts."[60]

But while remaining "not unmindful" of the general rule that it follow the state court construction and hold invalid the bonds upon which Gelpcke was suing, the Supreme Court declined to follow the general rule. Instead, it held that bonds, valid under judicial decisions outstanding when they were issued, remained valid and enforceable after those judicial decisions were overruled. "However we may regard the late [overruling] case in Iowa as affecting the future," the Court said, "it can have no effect upon the past."[61] The law which governed the life and validity of the bonds was thus the law at the time they were issued, not the law as subsequently declared. The underlying thrust was to say that the overruling opinion of the Supreme Court of Iowa would be considered as having prospective effect only in the federal courts; the overruled decision would continue to be regarded as the governing law by federal courts until the date of overruling.

Mr. Justice Miller, dissenting, saw the implications of this clearly. He conceded that the "moral force" of the majority's position was "unquestionably very great,"[62] but found that it could not "be sustained either on principle or authority."[63] His opinion points to principle and authority with Blackstonian vigor:

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58. 41 U.S. (16 Pet.) 1 (1842).

59. See Burns Mortgage Co. v. Fried, 292 U.S. 487 (1934); HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 630-31 (Tent. ed. 1958).

60. 68 U.S. (1 Wall.) at 206.

61. *Ibid.*

62. *Id.* at 210.

63. *Ibid.* See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 213-21 (1939).

> The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid.[64]

"The decision of the court makes the law"—there was the heart of *Gelpcke* as far as Justice Miller's dissent was concerned. The municipal bond cases, of which *Gelpcke* was the first, effectively recognized that state courts may sometimes and for some purposes be regarded as making law prospectively, much as legislatures do, rather than merely as declaring it retroactively, and that such regard would particularly be forthcoming when significant reliance had been placed upon the overruled decisions.[65] As Justice Holmes later said of *Gelpcke*, "the principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law."[66] And again, "the class of cases to which I refer have not stood on the ground that this court agreed with the first decision, but on the ground that the state decision makes the law for the State, and therefore should be given only a prospective operation when contracts had been entered into under the law as earlier declared."[67]

Subsequent cases continued to stress the reliance which parties had placed on the only legal guides available at the time they entered a contract or other transaction.[68] Some tried to rationalize the departure from Blackstone and the

64. 68 U.S. (1 Wall.) at 211.

65. The following language is typical:

> Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule.

Olcott v. The Supervisors, 83 U.S. (16 Wall.) 678, 690 (1872).

66. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 371 (1910) (dissenting opinion). Justice Holmes further criticized *Gelpcke* in Muhlker v. New York & N.R.R., 197 U.S. 544, 573 (1905).

67. 215 U.S. at 371.

68. See, *e.g.*, Anderson v. Santa Anna, 116 U.S. 356 (1886); Green Cty. v. Conness, 109 U.S. 104 (1883); New Buffalo v. Iron Co., 105 U.S. 73 (1881); Taylor v. Ypsilanti, 105 U.S. 60 (1881); Moores v. National Bank, 104 U.S. 625 (1881); Railroad Co. v. McClure, 77 U.S. (10 Wall.) 511 (1871); The City v. Lamson, 76 U.S. (9 Wall.) 477 (1869); Havemeyer v. Iowa Cty., 70 U.S. (3 Wall.) 294 (1865). See also Hill v. Atlantic & N.C. R.R., 143 N.C. 539, 55 S.E. 854 (1906); Haskeff v. Maxey, 134 Ind. 182, 33 N.E. 358 (1893). *Contra*, Norton v. Shelby Cty., 118 U.S. 425 (1886). More recent cases include Sutter Basin Corp. v. Brown, 40 Cal. 2d 235, 253 P.2d 649 (1953) and Reppel v. Board of Liquidation, 11 F. Supp. 799 (E.D. La. 1935). *Cf.* Catlett, *The Development of the*

declaratory theory along different theoretical lines. Thus, in *Douglass v. County of Pike*,[69] a municipal bond case similar on its facts to *Gelpcke*, the Supreme Court said:

> The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.[70]

Criminal and Other Cases

The cases just discussed illustrate departures from the declaratory theory of the judicial function in order to protect the social values represented by personal status or commercial arrangements created in reliance upon judicial decisions subsequently held erroneous. It was almost inevitable that the same result would occur when even more important values were at stake. An illustrative case is *State v. Jones*.[71] The defendant had been prosecuted several years before under a criminal statute providing penalties for conducting a lottery. The court held that the activity in which he was engaged was not a lottery within the meaning of the statute; accordingly, he was found not guilty.[72] The defendant continued to engage in the same activity—sanctioned by the court's opinion—and was eventually prosecuted a second time under the same statutory provision. The trial court dismissed on the authority of the earlier decision. On appeal, the state supreme court changed its former interpretation of the statute, held that the statute was intended to prohibit activity of the kind engaged in by the defendant, and overruled the decision in the first prosecution.[73] But the court declined to apply the overruling decision to the defendant. "The plainest principles of justice," it said, demand that the former decision be overruled prospectively; accordingly, "in denying retrospective operation to our overruling decision, we are governed by the overruled decision in settling the defendant's rights."[74]

Doctrine of Stare Decisis and the Extent to Which it Should Be Applied, 21 WASH. L. REV. 158, 167 (1948).

69. 101 U.S. 677 (1879).

70. *Id.* at 687.

71. 44 N.M. 623, 107 P.2d 324 (1940).

72. Roswell v. Jones, 41 N.M. 258, 67 P.2d 286 (1937).

73. 44 N.M. at 630, 107 P.2d at 329.

74. *Id.* at 631, 107 P.2d at 329. *But see* the opinion of Zinn, J., concurring in the overruling but declining to agree with the limitation to prospective application:

> To approve their action is to sanction a usurpation by the judiciary of a legislative function. We would not permit the Legislature to encroach upon the domain assigned exclusively to us by the Constitution of our State. By what right, other than by a judicial sense of superiority, do we presume to say this shall hereafter be

The momentum toward prospective overruling may have been unusually great in the *Jones* case because of the involvement of the defendant in both the overruled and the overruling cases: if anyone had a right to rely upon the first decision it was Jones himself. But the same result has followed in the more usual criminal cases in which different defendants were involved in the two decisions.[75] To allow "punishment of an act declared by the highest court of a state to be innocent, because the same court had seen fit to reverse its interpretation of a statute," said one court, "would be the very refinement of cruelty."[76]

Prospective overruling has also been made use of in cases involving the creation of a new liability where prior cases had specifically held that no liability existed.[77] A common example is provided by decisions abolishing charitable immunity of hospitals in certain tort actions; the abolition is made prospective because it resulted in the enforcement of a duty of care which could not have been enforced at the time the operative facts occurred.[78] Another example is provided by a case in which the reinterpretation of a state taxation statute to make taxable that which had previously been held to be nontaxable was given prospective effect only.[79]

THE MEANING OF SUNBURST

The technique of prospective overruling was thus not novel when in 1932 the United States Supreme Court was first asked to pass upon its constitutionality in *Great No. Ry. v. Sunburst Oil & Ref. Co.*[80] A Montana statute gave the State Railroad Commission authority to fix rates of carriage for intrastate shipments, and to change the rates upon a showing that they were unreasonable. The statute had been interpreted by the Montana Supreme Court in *Doney v. Northern Pac. Ry.*[81] to authorize a right of reparation in both carriers and shippers for excesses or deficiencies in payments whenever

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> the law which heretofore was not the law. To announce a rule of substantive law for the future is solely the function of the Legislature. If what the majority says is the law, then it has been the law ever since the Legislature passed the lottery law.

Id. at 635-36. 107 P.2d at 338.

75. See, *e.g.*, State v. Bell, 136 N.C. 674, 49 S.E. 163 (1904); State v. Simanton, 100 Mont. 292, 49 P.2d 981 (1935). *Cf.* People v. Maughs, 149 Cal. 253, 86 Pac. 187 (1906); Price v. Johnston, 334 U.S. 266, 292 (1948).

76. State v. Longino, 109 Miss. 125, 133, 67 So. 902, 903 (1915).

77. *Cf.* Langdell v. Dodge, 100 N.H. 118, 122 A.2d 529 (1956); Wilson v. Doehler-Jarvis, 358 Mich. 510, 100 N.W.2d 226 (1960). See also Sunray Oil Co. v. Commissioner, 147 F.2d 962 (10th Cir. 1945), *cert. denied*, 325 U.S. 861 (1945).

78. See, *e.g.*, Parker v. Port Huron Hosp., 361 Mich. 1, 26-29, 105 N.W.2d 1, 13-15 (1960). See also Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

79. Arizona Tax Comm'n v. Ensign, 75 Ariz. 376, 257 P.2d 392 (1953).

80. 287 U.S. 358 (1932). See Annot., 85 A.L.R. 262 (1933) (collecting cases of prospective overruling prior to *Sunburst*).

81. 60 Mont. 209, 199 Pac. 432 (1921).

the rate schedules were annulled or modified because unreasonable. After a determination that the relevant rates were excessive and unreasonable, Sunburst sued Great Northern to recover excess payments. The Supreme Court of Montana held that the *Doney* case had been erroneously decided and that the statute empowering the Commission or a court to invalidate rate schedules did not create a right of reparation in anyone with respect to charges paid under the schedule before it was invalidated. The *Doney* rule was therefore disavowed. However, because it constituted "the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it,"[82] the court elected to adhere to the *Doney* principle in the case before it and to allow Sunburst to recover the overpayments it had made to Great Northern. At the same time the court announced that the rule of the *Doney* case was disapproved and would not be followed in the future.

The United States Supreme Court granted certiorari to consider Great Northern's claim that it was denied due process by the Montana Supreme Court's disposition of the case. Great Northern's contention was said to be this: "Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is . . . a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future."[83]

The Court held unanimously that it was not; "the federal constitution," it said, "has no voice upon the subject."[84] The opinion—fittingly enough because of his long-held hopes that courts would develop techniques for accommodating stare decisis to judicial creativity—was written by Justice Cardozo.[85] The opinion stressed that the case presented primarily an issue of what judgments a *state* court might permissibly make "in defining the limits of adherence to precedent."[86] It found either of two alternative approaches within the range of permissible choice. On the one hand, a state may say what the Montana court said in the proceedings below, "that decisions of its highest court, though later overruled, are law none the less for intermediate transactions."[87] As to these transactions, "we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew."[88] That, in effect, was the manner in which *Gelpcke v. Dubuque* and its progeny had treated state court decisions.[89] On the other hand, a state "may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and

82. 287 U.S. at 361.
83. *Id.* at 363-64.
84. *Id.* at 364.
85. See note 30 *supra.*
86. 287 U.S. at 364.
87. *Ibid.*
88. *Id.* at 365.
89. See text at notes 57-70 *supra.*

the reconsidered declaration as law from the beginning."[90] That, in effect, was what the Court had found constitutional in *Tidal Oil Co. v. Flanagan*.[91] Because the due process clause does not inhibit a state from making either choice, the Court said, the "choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature."[92] Montana's choice being a permissible one, the judgment was affirmed.[93]

The usual analysis of *Sunburst* regards the decision as establishing the power both of state and federal courts to issue a prospective "prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule."[94] But as the present analysis suggests, the Court's central concern was rather with the power of a *state* court to treat a precedent in a manner that would honor *bona fide* reliance and reasonable expectations. And that problem, surely, was not a difficult one once the Court had upheld in *Tidal Oil Co. v. Flanagan* [95] the retroactive application of new decisions, thereby making "invalid what was valid in the doing,"[96] in disregard of reliance upon precedent and reasonable expectations as to its durability.

The Import of James v. United States

After the decision in *Sunburst*, the possibility of prospective overruling was not again to engage the attention of the Supreme Court until the recent decision of *James v. United States*.[97] The defendant was indicted for "wilfully and knowingly" failing to pay income tax on funds that he had embezzled. His defense was based upon the holding in *Commissioner v. Wilcox*,[98] decided fifteen years earlier, that embezzled funds do not give rise to taxable income. After James was convicted in the trial court and the conviction was affirmed on appeal, the Supreme Court granted certiorari.

A majority of six members of the Court voted to overrule *Wilcox* and hold that embezzled funds constitute taxable income.[99] A differently constituted majority of six voted to reverse the conviction—three on the ground that since James' actions took place during the period in which *Wilcox* was not yet overruled, the statutory requirement of "willful" evasion could not be proved;[100] and three others on the ground that *Wilcox* had been properly decided on the

90. 287 U.S. at 365.
91. 263 U.S. 444 (1924). For a discussion of this case, see text at notes 13-14 *supra*.
92. 287 U.S. at 365.
93. *Id.* at 367.
94. *Id.* at 366.
95. 263 U.S. 444 (1924).
96. 287 U.S. at 364.
97. 366 U.S. 213 (1961).
98. 327 U.S. 404 (1946).
99. The six members were Chief Justice Warren and Justices Frankfurter, Clark, Harlan, Brennan, and Stewart.
100. The three were Chief Justice Warren and Justices Brennan and Stewart.

merits and should be a bar to prosecution in *James*.[101] One Justice voted to affirm the conviction,[102] and the remaining two voted to remand the case to the district court for a new trial.[103]

The opinion of Chief Justice Warren, which announced the judgment of the Court that *Wilcox* be overruled and the conviction of James be reversed, makes no explicit mention of prospective overruling, but centers on the necessity for proof of the "evil motive and want of justification in view of all the circumstances"[104] which willfulness legally implies. It reversed the conviction because of the belief "that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed."[105] Read in the broadest sense, the opinion would seem to suggest that *James* should have prospective effect only, and that *Wilcox* should govern all taxpayer conduct until the date of decision in *James*.[106] Read more narrowly, the opinion would seem to suggest that *James* must be prospective at least with respect to criminal prosecutions, since the requisite willfulness could not be present prior to the date of decision in *James*, but that retroactive civil actions requiring no proof of willfulness might perhaps permissibly be based upon the holding in *James*. On either reading, however, the Chief Justice's approach results in the prospective announcement of a new rule of criminal liability. It may be fair to suggest that had the possibility of this partial prospective overruling not been available, the necessity of making the new ruling retroactive with respect to criminal prosecutions might have led the Chief Justice to follow prior cases in affirming or further distinguishing the holding in *Wilcox*.[107]

The concurring opinion of Mr. Justice Black announces his conviction that "*Wilcox* was sound when written and is sound now."[108] In addition to a discussion on the merits of overruling *Wilcox*, the opinion marshals an argument against "the prospective way in which this is done."[109] The gravamen of the argument is that the availability of prospective overruling is an invitation to courts to overreach the limits of judicial power and undertake to do what only a legislature may constitutionally do.

101. The three were Justices Black, Douglas, and Whittaker.

102. He was Mr. Justice Clark.

103. The two were Justices Harlan and Frankfurter.

104. 366 U.S. at 221.

105. *Id.* at 221-22.

106. *But cf. The Supreme Court, 1960 Term*, 75 HARV. L. REV. 193, 196 (1961), arguing that a "definitive answer to this question apparently must await a subsequent decision of the Court." No hint of an answer is provided by Rev. Rul. 61-185, 1961 INT. REV. BULL. No. 42. See also Beck v. United States, — F.2d — (9th Cir. 1962).

107. See, *e.g.*, Rutkin v. United States, 343 U.S. 130 (1952); J.J. Dix, Inc. v. Commissioner, 223 F.2d 436 (2d Cir.), *cert. denied*, 350 U.S. 894 (1955); Marienfeld v. United States, 214 F.2d 632 (8th Cir. 1954); United States v. Bruswitz, 219 F.2d 59 (2d Cir.), *cert. denied*, 349 U.S. 913 (1955); United States v. Wyss, 239 F.2d 658 (7th Cir. 1957).

108. 366 U.S. at 223.

109. *Ibid.*

The argument of Mr. Justice Black begins with a recitation of the fact that *Wilcox* authoritatively held that the relevant statutory language in the Internal Revenue Code did not impose a tax upon embezzled income. It continues:

> The Wilcox case was decided fifteen years ago. Congress has met every year since then. All of us know that the House and Senate Committees responsible for our tax laws keep a close watch on judicial rulings interpreting the Internal Revenue Code. Each committee has one or more experts at its constant disposal. It cannot possibly be denied that these committees and these experts are, and have been, fully familiar with the *Wilcox* holding. When Congress is dissatisfied with a tax decision of this Court, it can and frequently does act very quickly to overturn it.[110]

Moreover, he adds, the Internal Revenue Code was "completely overhauled and recodified" in 1954, after the *Wilcox* decision, and it left that decision intact."[111] Finally, repeated attempts to subject embezzled funds to income taxation have been defeated; this is not, therefore, a case in which Congress failed to change the law "because it did not know what was going on in the courts or because it was not asked to do so . . . ."[112] When the Court changed by judicial decision a statutory interpretation which Congress knew of for fifteen years and left standing for fifteen years, it "passed beyond the interpretation of the tax statute and proceeded substantially to amend it."[113] The thrust of this argument would appear to be that the first judicial interpretation of a statute gives a possibly ambiguous phrase a settled meaning and that any change in that meaning should be made by the legislature, particularly where the legislature can be said to have acquiesced in the substance of the judicial interpretation. For a court to change that meaning in such circumstances, in other words, is for it to amend a statute which Congress has declined to amend.[114] And such amendment, the opinion contends, may be particularly pernicious when it involves, in effect, the "creation" of a new crime. The opinion adds:

> [F]or a court to interpret a criminal statute in such a way as to make punishment for past conduct under it so unfair and unjust that the interpretation should be given only prospective application seems to us to be the creation of a judicial crime that Congress might not want to create.[115]

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110. *Id.* at 230-31.

111. *Id.* at 231.

112. *Id.* at 231-32. See the comments of Justice Stone in connection with the Sherman Act:

> The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940).

113. 366 U.S. at 224.

114. *Compare* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), *with* Girouard v. United States, 328 U.S. 61, 69-70 (1946). *Cf.* United States v. Girouard, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting).

115. 366 U.S. at 224-25.

Mr. Justice Black then reaches the heart of the matter: the availability of the technique of prospective overruling, by offering a court the means of avoiding the often unpleasant consequences of retroactivity, encourages it when interpreting a statute to make law, not in the acceptable and inevitable judicial sense in which courts make law but in the unacceptable legislative sense in which legislatures make law.[116] The unavailability of prospective overruling is thus viewed as a safeguard against inappropriate, because unauthorized, judicial action.[117] In Mr. Justice Black's statement of it:

> [O]ne of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. This Court and in fact all departments of the Government have always heretofore realized that prospective lawmaking is the function of Congress rather than of the courts. We continue to think that this function should be exercised only by Congress under our constitutional system.[118]

Mr. Justice Harlan, conceding that *Wilcox* was wrongly decided, addresses his attention to fashioning an appropriate method of overruling it.[119] He starts with the assumption that "our decisions in the tax and any other field for that matter *relate back* to the actual transactions with which they are concerned, and that that is only the normal concomitant of the fact that we do not sit as an administrative agency making rulings for the future, but rather adjudicate actual controversies as to rights and liabilities under the laws of the United States."[120] Even conceding that *Wilcox* is wrong, therefore, an "outright reversal"[121] of the conviction could not be reconciled with the view that the interpretation of an unchanged statute must "relate back" to the time of enactment. But Mr. Justice Harlan suggests that James should be able to secure a reversal if he had in fact relied upon the holding in *Wilcox* and therefore lacked the willfulness required for conviction.[122] This would be a question of fact to be decided at a new trial in the district court; it should not be decided on appeal either in favor of the defendant, as the opinion of Chief Justice Warren decided it, or against the defendant, as the opinion of Mr. Justice Clark decided it. If *bona fide* reliance upon *Wilcox* could not be demonstrated, then the principle of relation back would govern and would

116. *Cf.* Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226-27 (1908) (Holmes, J.).

117. Values of stare decisis are, of course, also relevant here. See generally Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137 (1946); Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941); Lobingier, *Precedent in Past and Present Legal Systems*, 44 MICH. L. REV. 955 (1946); Ellenbogen, *The Doctrine of Stare Decisis and the Extent to Which It Should be Applied*, 20 TEMPLE L.Q. 503 (1947).

118. 366 U.S. at 225.

119. *Id.* at 241.

120. *Id.* at 244-45.

121. *Ibid.*

122. *Id.* at 245.

make the ruling in *James* applicable.[123] This allowance of reliance as a defense would also seem to meet constitutional objections centering upon the lack of adequate notice.[124]

The opinions of Mr. Justice Black and Mr. Justice Harlan in the *James* case were apparently the first in the Supreme Court to suggest that prospective overruling raised problems of constitutional significance. Yet neither opinion undertook an analysis of the significance of these problems. Mr. Justice Black alone cited *Sunburst*, and for the imprecise proposition that "[w]e realize that there is a doctrine with wide support to the effect that under some circumstances courts should make their decisions as to what the law is apply only prospectively."[125]

Some Earlier Assumptions

The assumption that the holding of *Sunburst* applies to the federal courts and sanctions their authority to speak prospectively had been made prior to *James* by at least two Justices of the United States Supreme Court. In *Mosser v. Darrow*,[126] the Court held that a reorganization trustee who expressly permitted key employees to profit from trading in securities of the trust was personally liable for profits realized by these employees. Although conceding that "there is no hint or proof that he [the trustee] has been corrupt or that he has any interest, present or future, in the profits he has permitted these employees to make,"[127] the Court held that good faith was not a defense and found that the "most effective sanction for good administration is personal liability for the

123. A second possible defense—that "at the time he failed to make his return [James] was not under any misapprehension as to the law, but indeed that at the time and under the decisions of this Court his view of the law was entirely correct"—Mr. Justice Harlan suggests only to reject:

> Petitioner's obligation here derived not from the decisions of this or any other court, but from the Act of Congress imposing the tax. It is hard to see what further point is being made, once it is conceded that petitioner, if he was misled by the decisions of this Court, is entitled to plead in defense that misconception. Only in the most metaphorical sense has the law changed: the decisions of this Court have changed, and the decisions of a court interpreting the acts of a legislature have never been subject to the same limitations which are imposed on legislatures themselves . . . forbidding them to make any *ex post facto* law . . . .

366 U.S. at 247.

124. See text at notes 21-23 *supra*. The opinion of Mr. Justice Black in *James* says:

> [A] criminal statute that is so ambiguous in scope that an interpretation of it brings about totally unexpected results, thereby subjecting people to penalties and punishments for conduct which they could not know was criminal under existing law, raises serious questions of unconstitutional vagueness.

366 U.S. at 224. See also Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960); Bickel, Foreword: *The Passive Virtues*, 75 Harv. L. Rev. 40, 62-64 (1961); United States v. Cardiff, 344 U.S. 174 (1952).

125. 366 U.S. at 224.

126. 341 U.S. 267 (1951).

127. *Id.* at 275.

consequences of forbidden acts . . . ."[128] Mr. Justice Black dissented.[129] Because the "rule of trustee liability [now announced by the Court] did not exist before today," he found "grossly unfair" its retroactive application to a trustee who could not have known that his conduct was subject to such a rule.[130]

> Despite its novelty, there is much to be said in favor of such a rule for cases arising in the future. It seems to me, however, that there is no reason why the rule should be retroactively applied to this respondent, when to do so is grossly unfair. Admittedly, the most that can be said against respondent is that he made an honest mistake which before today would not have subjected him to the heavy financial penalty. Under these circumstances, if the new rule is to be announced by the Court, I think it should be given prospective application only. See *Great Northern R. Co. v. Sunburst Oil Co.* . . . .[131]

Another statement, also relying upon *Sunburst*, was made by Mr. Justice Frankfurter in his concurring opinion in *Griffin v. Illinois*.[132] The case involved a challenge to the constitutionality of an Illinois statute which governed the procedure by which the state provided appellate review of criminal convictions. In order to obtain appellate review a defendant was required to furnish the appellate court with a bill of exceptions or with a report of the proceedings at the trial certified by the trial judge. Often such documents could be prepared only if the defendant had access to a stenographic transcript of the trial proceedings. Although the state furnished a free transcript to any person appealing from a sentence of death, indigent defendants who wished to appeal from less severe sentences were required to pay for the transcript themselves or to forego the opportunity to appeal. Griffin was denied an appeal from a conviction for armed robbery because of financial inability to buy a transcript. The Supreme Court reversed. It held that once a state provides for appellate review and makes that review "an integral part" of its "trial system for finally adjudicating the guilt or innocence of a defendant,"[133] it may not condition access to that review upon the financial ability or status of the defendant. The Court ruled that the state was required either to furnish a transcript to every indigent defendant who wished to appeal or to make other arrangements for affording adequate and effective appellate review to indigent defendants, assuming in each instance that the state desires to continue providing some form of judicial review. The cause was remanded for further action not inconsistent with the opinion.

Mr. Justice Frankfurter, concurring in the disposition of the case, wrote a separate opinion. He agreed that the procedure under the Illinois rule amounted

128. *Id.* at 274.
129. *Id.* at 275.
130. *Id.* at 275-76.
131. *Id.* at 276. *But see* Mr. Justice Black's later view that "prospective lawmaking is the function of Congress rather than of the courts." James v. United States, 366 U.S. 213, 225 (1961). See text at notes 108-18 *supra*.
132. 351 U.S. 12, 20 (1956).
133. *Id.* at 18.

to "squalid discrimination"[134] and that if a state "has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity."[135] Having announced his agreement with the substantive judgment of the Court, Mr. Justice Frankfurter then embarked upon a discussion of the nature of the law which had been newly declared. While agreeing that Griffin should be given the opportunity to appeal, he urged that the Court should have specifically limited its ruling to prospective application because "candor compels acknowledgment that the decision rendered today is a new ruling" and, for "sound reasons, law generally speaks prospectively."[136] The operative significance of such an application would be to deny writs of habeas corpus to presently-incarcerated prisoners who were precluded from obtaining judicial review of their convictions because of their inability to purchase a transcript. The application of the new rule prospectively only, Mr. Justice Frankfurter concluded, "is consonant with the spirit of our law and justified by those considerations of reason which should dominate the law . . . ,"[137] citing the *Sunburst* case.

It should be noted that the action urged by Mr. Justice Frankfurter in *Griffin* differed significantly—even more significantly than *Mosser v. Darrow* did—from the action taken by the state court in *Sunburst*. His opinion in *Griffin* would not postpone application of the new rule to the next case, as the state court had in *Sunburst*, but instead would apply the new rule in the case before him. Since Mr. Justice Frankfurter was not engaging in "future prophecies alone," his opinion cannot be cited in support of the usual interpretation of *Sunburst*.

The litigation in the *Sunburst* case brought to the Supreme Court the limited question of whether the use of prospective overruling by a state supreme court denied a party due process under the fourteenth amendment. The decision was that it did not. The case did not in any way raise on its facts the complex question of whether the use of prospective overruling by a federal court—bound as a state court is not by the strict requirements of Article III —was constitutionally permissible.[138] This constitutional question is of a different order from the question raised by the facts in *Sunburst*. At least it is far from clear that the same result should follow in the one case as in the

134. *Id.* at 24.
135. *Ibid.*
136. *Id.* at 25-26.
137. *Id.* at 26.
138. Professor Davis finds judicial power to overrule prospectively "inherent" and "intrinsic" in all courts. 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.09, at 352 and n.18 (1958).

Professor Moore says:

> As far as state courts are concerned the United States Constitution neither precludes nor compels the prospective-effect approach. And, while a federal constitutional court cannot render an advisory opinion, the same view should prevail in the federal courts for the following reasons. The overruling decision is rendered in an actual controversy between adverse parties. The fact that a former decision is overruled,

other.[139] The question merits an independent analysis that the cases have neglected to give it.

ARTICLE III AND PROSPECTIVE OVERRULING

Article III of the Constitution extends the judicial power of the federal courts "to all Cases" and "to Controversies." That the exercise of this power must be limited to the resolution of actual and concrete cases and controversies—and may not be brought to bear upon abstract and hypothetical questions, however great their interest—has been a ruling constitutional principle at least since *Marbury v. Madison*.[140]

As Professor Bickel has written of this limit upon federal courts:

> It follows that courts may make no pronouncements in the large and in the abstract, by way of opinions advising other departments upon request; that they may give no opinions, even in a concrete case, which are advisory because they are not finally decisive, the power of ultimate disposition of the case having been reserved elsewhere; and that they may not decide non-cases, which are not adversary situations and in which nothing of immediate consequence to the parties turns on the results.[141]

In short, the power of a federal court under Article III to make authoritative determinations and declarations of law derives solely from its power to decide cases. And a court's holding in the decision of a case is entitled to binding effect as a pronouncement of law only to the extent that the rules of law held to govern were necessary to the resolution of the conflict presented. But whether a federal court has paid appropriate respect to the injunctions of Article III should not rest finally upon a literal inquiry into whether a particular statement in a judicial opinion is necessary to the decision of the case, or whether the decision on the facts could nonetheless stand without it. Larger considerations are at play here, considerations which relate to the service which Article III renders to a system based upon the separation of governmental powers.

> but without retroactive effect, indicates a careful and thoughtful evaluation of the correct legal doctrines involved. The prospective application of the overruling decision is merely a product of the case or controversy presented.

1 MOORE, FEDERAL PRACTICE 4082-84 (2d ed. 1959).

139. *But see* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

> The *Sunburst* case came up from the state courts but I see no reason to suppose that a different result would be reached in a federal, constitutionally established court .... And since federal courts have frequently asserted judicial power to overrule, why should not they prospectively overrule; the greater includes the lesser.

Id. at 15 n.48.

140. 5 U.S. (1 Cranch) 137 (1803). Although *Marbury v. Madison* may be read as a limitation only upon judicial review of the actions of other branches of government, its rationale has been broadened to become a general jurisdictional limitation on the actions of federal courts in all cases.

141. Bickel, Foreword: *The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

As *Marbury v. Madison* made clear, preservation of the concept of separation of powers embodied in the Constitution requires that the Supreme Court in certain circumstances review the actions of the legislative and executive branches of the government. If judicial review is a constitutional necessity, however, invocation of this ultimate power by men who in the literal sense are irresponsible remains tolerable only so long as that power governs no more than necessity strictly dictates. And adherence to the limitations and prohibitions of Article III represents one means of insuring that binding judicial decisions are not made until the branches of government which are directly accountable to the people have had an opportunity to pass upon the issues involved. For as Thayer a half-century ago reminded us:

> [T]he tendency of a common and easy resort to this great function [of judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[142]

Article III can thus be said to embody a rationale which seeks—for reasons which search the essence of the separation of powers—to make it difficult for courts to pass judgment upon decisions of other branches of government by establishing strict limits to the exercise of judicial power.[143] To the degree that the preservation of these policies is deemed important, Article III should be given a construction which limits the power of federal courts to disturb or to deny the validity of statutes or actions of other branches of government.

When it is subjected to this kind of interpretation, Article III appears as a symbolic vehicle for carrying the freight of judicial abstention—even, as it were, a "benevolent fiction." The final authority of a court rests upon public respect for its decisions. That public respect, which ultimately enables federal courts to pass judgment upon the acts of its partners in government is based, however, upon an image which represents courts as declaring legal principles with an authority and certainty that cannot be expected from legislatures when they make law on an experimental, trial-and-error basis. The public image which sustains the unique powers of a federal court is thus not strikingly different from the image which possessed Blackstone; both images bespeak an uneasiness about a court making law. The doctrines of judicial abstention which are mirrored in Article III may thus be viewed as a means for preserving public respect for the judiciary by deterring courts from making pronouncements of law except in those cases where the constitutional duty cannot be avoided.[144]

Thus, although the realist jurisprudence may have laid to rest the fiction that judges merely find the law which legislatures make, the crucial need in

142. THAYER, JOHN MARSHALL 106-07 (1901).

143. See, *e.g.*, Poe v. Ullman, 367 U.S. 497 (1961); Muskrat v. United States, 219 U.S. 346 (1911).

144. See generally Bickel, Foreword: *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

a democracy to limit the exercise of judicial review provides the rationale for a view of the case and controversy requirements of Article III that would seem to conflict as much as the Blackstonian view had with the rationale underlying prospective overruling. For prospective overruling is designed to make it easier—not more difficult—for a court to strike down the action of a legislature or to reverse its own prior decision of which the legislature had been aware. Indeed, a central argument usually advanced for the use of prospective overruling is that it will encourage courts to change the law in situations where the consequences of retroactivity would otherwise discourage such a change.[145] To the degree that a purpose of Article III is to discourage courts from making changes in the law when legislatures are as capable of making the changes, prospective overruling should be regarded as within its prohibitory intent. And although Article III is usually regarded as imposing limitations only upon judicial review of the actions of coordinate branches of the federal government, its rationale would seem to counsel similar limitations upon federal judicial review of the actions of state governments.[146]

The relevance of these propositions about Article III and prospective overruling can be illustrated by brief reference to the four opinions discussed above —those of Justice Cardozo in *Sunburst*, Mr. Justice Black in *Mosser*, Mr. Justice Frankfurter in *Griffin*, and Chief Justice Warren in *James*.

In *Sunburst*, Justice Cardozo was passing upon the action of a state court in applying the holding of a prior case to the resolution of the factual conflict before it and simultaneously announcing that the case was overruled and would not be followed in the future. The precise decision in the case before the state court was, therefore, that the rule of the prior case must be followed. Under the analysis suggested here, the application of that rule to the facts in dispute would mark the limit of the constitutional power of a federal court under Article III. The announcement that the rule of the prior case would henceforth be considered overruled—"a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule,"[147] as Justice Cardozo put it—would be beyond the authority of a federal court because it would not represent a pronouncement of law derived from the case or controversy before it.

The opinion of Mr. Justice Black in *Mosser* would be susceptible to the same analysis: a federal court would be held to lack the constitutional power

145. See articles cited at notes 28-29 *supra*.

146. The view that state governments should be allowed to function as laboratories for social experimentation—free from federal judicial intervention except in "shocking" cases of the denial of substantive rights—was, of course, central to the thinking of Justices Brandeis and Holmes. See, *e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This view underlies the line of cases, beginning with Nebbia v. New York, 291 U.S. 502 (1934), which marked the decline of substantive due process with respect to rights without a claim to a preferred position in the constitutional hierarchy. See, *e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Palko v. Connecticut, 302 U.S. 319 (1937); Note, 70 YALE L.J. 322 (1960).

147. 287 U.S. at 366.

to announce a new rule of fiduciary duty at the same time that it applied a different and discarded rule to the resolution of the case and controversy before it. These two opinions thus represent attempts at prospective overruling in a manner which when done by federal courts must be held to raise serious Article III problems.

The opinions of Mr. Justice Frankfurter in *Griffin* and of Chief Justice Warren in *James*, however, are different in a significant way; each would apply the newly-announced rule to the facts before the Court, while adding some general statements about how subsequent cases will or should be treated. The resolution of the actual case and controversy in *Griffin*, under Mr. Justice Frankfurter's approach, would involve the application of the new rule to its facts; Griffin would be provided with a free stenographic transcript of the trial proceedings in his case if he could not afford to pay for it himself. Similarly, Chief Justice Warren would apparently apply the new rule that embezzled income is taxable to the defendant James, although finding that another element necessary for conviction, willfulness, was lacking still. Both opinions apply the new rule to the facts before the Court. The announcement of the new rule in such circumstances means that it becomes intimately bound up with the decision of a case and controversy. In a literal sense, it is *decisive* of that case and controversy.

In summary, then, a state court, after fashioning a new rule, may apply it: (1) to conduct occurring subsequent to the announcement only; (2) to conduct occurring subsequent to the announcement and also to the present litigants; or (3) to conduct occurring subsequent to the announcement, to the present litigants, and also to conduct which occurred prior to the announcement. For a federal court, however, the choice is more limited: Article III forecloses selection of the first alternative; but it "has no voice" as to selection between the other two.[148] Before making this selection, a federal court must determine whether the decision as to retroactivity should be made in the case in which the new rule is announced or should be deferred to a subsequent case in which a party seeks application of the new rule to prior conduct. Once this decision is made, it becomes necessary to identify criteria relevant to choice.

When to Decide Retroactivity

"The most important thing we do," said Justice Brandeis, "is not doing."[149] His statement was a shorthand method of expressing one of the abiding themes of his judicial thought: that the Supreme Court should avoid precipi-

148. Of course the choice for a federal court may be more limited even with respect to these two alternatives if the change in law has not been made by the court itself, but instead has been made by a change in a treaty, constitution, or statute, or by decision of another court. That is the teaching of such cases as *Schooner Peggy*, *Chambers*, and *Vandenbark*. See text at notes 34-51 *supra*.

149. Conversation with Felix Frankfurter, manuscript on file at Harvard Law School Library; quoted in Bickel, The Unpublished Opinions of Mr. Justice Brandeis 1, 17 (1957).

tate decision of constitutional issues, and that it should decide such issues only when it is unable otherwise to dispose of a case properly before it.[150] This is more than merely a formal statement of the jurisdictional fact that a federal court acts beyond its Article III powers when it decides something other than an actual "case" or "controversy." It is also a statement which justifies that jurisdictional fact by at least two important results which flow from a strict regard for it.

First, judicial insistence upon deciding only "cases" and "controversies" in the constitutional sense and avoiding decision in hypothetical noncases is a method of insuring that courts have before them the most complete and developed record possible before they render a decision.[151] Similarly, insistence upon truly adverse parties, aware crucially that the issue has been joined in a way that now permits of resolution nowhere in the system but in the courts and that resolution is a pressing present need, offers an assurance that courts will be provided with more complete and adequate factual records. And the more developed the record which the court has before it, the greater the likelihood that a wise and fair decision will result.[152]

Second, judicial insistence upon resolving conflicts only when they cannot be resolved appropriately by any other authority in the system is a method of insuring that in a democracy full recourse will be had to the political branches of government before judicial intervention is available.[153] If it is true, as de Tocqueville said, that in the United States all political questions eventually become judicial questions,[154] it may also be true that many political questions, when attempt is first made to bring them to courts, are still considerably distant from being judicial questions. When this difference is made apparent to "the expert feel of lawyers,"[155] a court encourages legislative and executive responsibility by refusing to provide the parties a resolution of their conflict so long as other, more representative bodies remain available for petition.

These considerations and the statement of Justice Brandeis which prompted them, relate not only to the decision of whether a court should declare the

150. See BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 2-3 (1957). *Cf.* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928) (Brandeis, J.); International News Serv. v. Associated Press, 248 U.S. 215, 248 (1918) (Brandeis, J., dissenting).

151. *Cf.* Adler v. Board of Educ., 342 U.S. 485, 503 (1952) (Frankfurter, J., dissenting); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

152. See Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

153. In Professor Frankfurter's words:

> Perhaps the most costly price of advisory opinions is the weakening of legislative and popular responsibility. It is not merely the right of the legislature to legislate; it is its duty . . . . It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay.

Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007-08 (1924).

154. See 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 306 (4th ed. 1841).

155. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

existence of a case or controversy which it may appropriately entertain; they also relate to the discretionary decision of whether a court, having announced a new rule, should join to that announcement a statement on whether or not the new rule will be retroactively applied. Thus, the decision of whether to make an announcement with respect to retroactivity becomes, in these circumstances, almost precisely a decision as to whether the issue of retroactivity has been presented to the court *as*—and not merely in association with—an actual case or controversy. In wide measure the same reasons—recited above—which at once justify and limit the court in hearing a question in the first place also justify and limit it in hearing the companion question of retroactivity.[156]

The question of the retroactivity of a specific judicial decision should be decided on the same conditions as all other questions decided by federal courts: only when presented in a factual posture which can appropriately be termed a case or controversy in the constitutional sense. In deciding wisely when to rule upon retroactivity, a court can encourage the subsequent framing of the issue in more precise factual terms and can abide the resolution of it until other "departments," in Judge Hand's probing archaism,[157] have had an opportunity to meet it, perhaps in a manner to make judicial review unnecessary.[158] A court's use of deliberate silence about the retroactive effect of

156. In many cases there will be no necessity for a court to indicate whether or not its decision is retroactive because any retroactive rights that might be granted would be incapable of enforcement. For example, § 6(a) of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 780 (1958), denies to members of Communist organizations the right to apply for, to use, or to renew a United States passport. It is not unlikely that if a court test is had, the statute will be declared unconstitutional. *Cf. The Supreme Court, 1960 Term*, 75 HARV. L. REV. 80, 111 (1961). If the Court were to announce that its decision were retroactive, such a declaration would not seem capable of having any operative consequences. Assuming a plaintiff who, prior to the decision, had been denied a passport under the invalid provision and who could prove the damages resulting from the denial, there does not appear to be any federal statute authorizing suit. To declare such a decision retroactive would therefore be to declare a right which has no remedy.

Similarly, the Hill-Burton Act of 1944, 60 Stat. 1041 (1946), 42 U.S.C. § 291 (1958), which provides federal funds to assist the states in the construction of public and other nonprofit hospitals in accordance with federally-approved plans, specifically declares that a state plan providing for hospital facilities which are racially "separate but equal" shall not on that ground be denied approval. 42 U.S.C. § 291e(f) (1958). Because "separate but equal" facilities have been held unconstitutional in so many other areas of United States life, it is likely that, when judicially tested, they may be held unconstitutional in hospitals supported by federal and state funds. See N.Y. Times, Feb. 13, 1962, p. 1, col. 4, reporting the bringing of suits to test the statute's constitutionality. But even if such a holding were declared to be retroactive, it is nearly inconceivable that the federal government would be successful in a suit against a state for recovery of federal funds already spent by the state under the invalid statutory authorization: the equities of reliance are weighted much too unevenly to allow that result. In both of these cases, the question of whether the court's declaration of unconstitutionality could or would be retroactive or not is, therefore, in consequential terms, of no real meaning at all.

157. See generally HAND, THE BILL OF RIGHTS (1958); see also *Learned Hand*, 71 YALE L.J. 108 (1961).

158. See, *e.g.*, the opinion to the President of Attorney General Homer Cummings as

a judicial decision should be regarded as another technique of declining jurisdiction in the cause of institutional competence; in short—a passive virtue.[159]

The Durham Case

A case which is particularly instructive on several aspects of this problem is *Durham v. United States*,[160] in which the Court of Appeals for the District of Columbia supplemented the existing rule with a new rule for the determination of insanity in criminal cases. "[I]n adopting a new test," the court said, "we invoke our inherent power to make the change prospectively."[161] Perhaps this qualification of the reach in time of the *Durham* rule was necessary tactically in order to secure approval from a sufficient number of members of the court for such a significant change in the law. But however necessary it was tactically, the qualification remains questionable for several reasons.

First, after the court had decided that the new rule should be applied to the facts in *Durham* upon remand, any further announcement of how the rule would be applied to other fact situations not before the court was unnecessary to the decision and was therefore premature.[162]

Second, if the rule was denied retroactive effect only because of fears that the courts would be burdened administratively by an overwhelming number of petitions for writs of habeas corpus from persons convicted after being found sane under the M'Naghten rule, these fears were based upon no more than a guess. Assuming *arguendo* that an excessive burden upon the administration of the courts is a valid reason for prospective decision-making, the reality of such a burden could best have been determined by waiting to see how many petitions were filed in how concentrated a period of time. If the number filed were awesome, then the same result of denying retroactivity could have been announced in a subsequent case. If the number filed were manageable, then the announcement denying retroactivity was unnecessary on

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to whether West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *overruling* Adkins v. Children's Hosp., 261 U.S. 525 (1923), would have retroactive effect. 39 OPS. ATT'Y GEN. 22 (1937), reprinted in FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW 111-12 (2d ed. 1961).

159. See Bickel, Foreword: *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

160. 214 F.2d 862 (D.C. Cir. 1954).

161. *Id.* at 874 (citing cases).

162. It may be argued that because the Court of Appeals in *Durham* reversed the defendant's conviction and ordered a new trial on the ground that the prevailing M'Naghten rule for determining insanity had been misapplied by the trial court, any additional statement about what rule to apply in the future was prospective overruling of the kind prohibited to federal courts by Article III. However, even if this is a permissible reading of the case, the federal courts of the District of Columbia are regarded as state courts, not bound by the case and controversy requirements of Article III, when they hear cases not based upon federal statutes of national applicability. See Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923). The problems raised by the textual discussion of *Durham* remain relevant to all federal courts.

these grounds and may have deprived deserving petitioners of the benefit of the new rule.[163]

Third, if the Court of Appeals had been silent in *Durham* upon the retroactive effect of the new rule, the issue of retroactivity would first have been raised in the trial courts of the District of Columbia,[164] where it could have been fully briefed and argued, as it apparently was not in *Durham*. Adversary litigation directed solely to the question of retroactivity would probably have developed for the court both the necessities and the injustices of prospective application of the new rule. The court would then have had more detailed evidence upon which to base its decision on retroactivity.

Fourth, by choosing to make the announcement of prospectivity in the *Durham* case, the court in effect deprived itself of the opportunity to have before it specific cases which might place a severe strain on the sense of injustice created by denying retroactive application. At least it is possible that in many cases retroactive application would seem not only desirable, all factors considered, but even equitably mandatory. Effectuation of this possibility—that the *Durham* rule might be applied most equitably on a case-by-case basis—the court foreclosed by its premature announcement.[165]

In summary, *Durham* seems a case in which the uses of silence would have been appropriate and, indeed, fruitful. The result of silence could have been a decision upon retroactive application made in the context of actual cases and upon actual facts. Perhaps under the tension of such objectified claims to retroactivity, the position eventually reached would have been wiser because less sweeping and because more related to the facts of given cases.

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163. Moreover, retroactive application of the new rule could not be uniform because the procedural posture of many of the cases which would subsequently come before the court would compel retroactivity. For example, those cases in which the crime was committed before the crime in *Durham* but which came to trial after the decision in *Durham* would be governed—in effect retroactively—by *Durham*. This means that chance alone would control the inevitable retroactive application. See text at notes 34-51 *supra*.

164. However, this referral of the decision as to retroactivity to the lower courts for initial judgment will be useful for higher courts only if the lower court judges attempt to deal realistically with the issues involved. It will be rendered of insignificant value if the lower court judges reach their decision as to retroactivity by a lexicographical analysis of the diction and verb tenses of the overruling opinion in a search for its intent. That this happens may be seen from two recent cases applying Mapp v. Ohio, 367 U.S. 643 (1961). See People v. Figuero, 30 U.S.L. WEEK 1050, 2158 (N.Y. Cty. Court, Kings Cty., Sept. 30, 1961), and Hall v. Warden, 30 U.S.L. WEEK 2360 (D. Md. 1962). See also People v. Ryan, 152 Cal. 364, 92 Pac. 853 (1907); Johnson v. Stoveken, 52 N.J. Super. 460, 145 A.2d 801 (1958); State v. Long, 177 A.2d 609 (Essex Cty. Ct., N.J., Jan. 24, 1962), relying upon "the rationale of the decision of the United States Court of Appeals in Warring v. Colpoys," discussed in text at notes 174-85 *infra*.

165. For instance, it is not inconceivable that habeas corpus would be denied to those who conceded the issue of insanity at trial, but granted to those who contested it. Other criteria for treating different petitioners in different manners, depending upon the totality of the circumstances in each individual case, are not difficult to imagine. The point is that courts are more likely to think in terms of these criteria when actual cases demand consideration of them than when they are making abstract determinations as to retroactivity *vel non*. That is one of the lessons of the remand in *Griffin*. See text at notes 166-67 *infra*.

The Griffin Case

A second case which is instructive for these purposes, although for different reasons, is *Griffin v. Illinois*.[166] In that case the Supreme Court held that if a state conditioned judicial review in criminal cases upon the furnishing to an appellate court of a stenographic transcript of the trial, it must furnish such transcripts at state expense to defendants who cannot afford them. The case was remanded to the state court for application of the new principle. In thus disposing of the case, the Court abstained from deciding the questions not presented by the facts in *Griffin* of whether the new rule should be applied retroactively to persons presently imprisoned. Its judgment in abstaining was proved wise by subsequent events.

Upon remand, the Supreme Court of Illinois amended its court rule and announced that transcripts would be furnished at state expense to all indigent prisoners, regardless of whether they were sentenced prior to the Supreme Court's decision in *Griffin* and regardless of whether they had pursued post-conviction remedies in which they might have raised the issue ultimately presented and decided in *Griffin*.[167] The state decision was made with a sophisticated awareness of the variety of circumstances on the basis of which a claim of retroactivity could be made, an awareness which might well have been absent from a sweeping pronouncement by the United States Supreme Court on the issue of retroactivity. The effect of the state court's decision was to make unnecessary, at least with respect to Illinois, a determination by a federal court of whether *Griffin* should be applied retroactively. In this particular case, that determination was made unnecessary because the state court decided upon remand that it would apply the free-transcript rule retroactively. If the state rule had not been changed in this manner, presumably lower federal courts would have had to determine in the first instance whether *Griffin* should be applied retroactively; and these lower court determinations eventually would have reached the United States Supreme Court. However, in making its decision upon retroactivity at that point, the Supreme Court would have been able to consider the reasoning in the lower court's opinion or perhaps in conflicting opinions in cases coming from different lower courts. Such an opportunity may increase the likelihood that as many arguments and grounds of reasoning as possible will be before the Court when it makes its decision, and this likelihood may increase the quality of the decisions which result.[167a]

166. 351 U.S. 12 (1956).

167. People v. Griffin, 9 Ill. 2d 164, 137 N.E.2d 485 (1956) (Schaeffer, J.). *But see* People v. Berman, 19 Ill. 2d 579, 169 N.E.2d 108 (1960).

167a. It should be noted, however, that at least one serious question is raised by the suggestion that the United States Supreme Court postpone the decision as to the retroactivity of a new rule until it has before it a group of conflicting, well-considered opinions by lower federal courts. In a case like *Mapp v. Ohio*, conflicting lower court opinions might mean that some prisoners would have been granted habeas corpus and been released, while others would have been denied habeas corpus and been retained in prison, by the time the question of retroactivity came before the United States Supreme Court. If the Court's

The Eskridge Case

When the issue of retroactivity is properly a part of the case and controversy before the court, it should of course be decided. And, as important, it should be decided in a reasoned opinion which explains the factors that compelled the result. An example of a case in which the United States Supreme Court avoided this duty is *Eskridge v. Washington State Board*,[168] the case which first presented the Court with the question of whether to apply *Griffin* retroactively.[169] Eskridge was convicted of murder in 1935 and was prevented at that time from seeking appellate review because of his inability to pay for the stenographic transcript required by statute. In 1956, after the decision in *Griffin*, he sought release upon a writ of habeas corpus; the writ was denied by the state courts of Washington. On certiorari, the Supreme Court reversed, holding in a per curiam opinion that Eskridge had been denied the constitutional right declared in *Griffin*. Despite the fact that two justices dissented, "believing that on this record the *Griffin* case, decided in 1956, should not be applied to this conviction occurring in 1935,"[170] the majority did not explain their logic of retroactivity. When the question of retroactivity is the central question in a case, a court should accompany its decision with reasons. As Professor Freund has said of *Eskridge*:

> The answer involves considerations, not only of principle but also of practical administration, that seem to call at least for some further delineation; but the problem was disposed of summarily on the authority of the earlier decision [in *Griffin*].[171]

Assertion without reasons is unnecessary when reasons are available, as they are here, and unwise in any circumstance; it leads too easily to the suspicion that the law of the case is based upon power alone, and not upon reasoned analysis and judgment.[172]

These cases[173] are instructive, then, in helping to answer the question of when, in the case-by-case process of announcing and initially applying a new

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decision was to deny retroactive effect to the new rule, the question would remain of the status of persons already released from jail by lower court writs of habeas corpus.

168. 357 U.S. 214 (1958).

169. See also Burns v. Ohio, 360 U.S. 252 (1959), applying the rule in *Griffin* to a conviction had in 1953; Comment, 55 MICH. L. REV. 413 (1957).

170. 357 U.S. 214, 216 (1958).

171. FREUND, THE SUPREME COURT OF THE UNITED STATES 185-86 (1961).

172. See Brown, Foreword: *Process of Law*, 72 HARV. L. REV. 77 (1958); Hart, Foreword: *The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959).

173. A further example of the failure of the Supreme Court to address itself to relevant questions of retroactivity is provided by Reck v. Pate, 367 U.S. 433 (1961). Emil Reck was convicted of murder in 1936 and sentenced to a term of 199 years. After earlier proceedings were unsuccessful, People v. Reck, 392 Ill. 311, 64 N.E.2d 526 (1945); Reck v. People, 7 Ill. 2d 261, 130 N.E.2d 200 (1955), *cert. denied*, 351 U.S. 942 (1956), Reck sought a writ of habeas corpus, alleging that a confession used against him at trial had been obtained illegally. The district court noted that "Reck was convicted of this crime in

rule, a court should reach the issue of retroactivity. In *Durham*, the question was presented prematurely and need not have been reached. In *Griffin*, the question similarly was presented prematurely and was appropriately avoided. In *Eskridge*, the question was appropriately before the court in a case and controversy requiring its resolution; it was therefore properly reached, but should have been decided more forthrightly than by the *sub silentio* technique employed.

Guides and Criteria For Retroactivity

Once a court has properly before it the specific issue of retroactivity, and once it has recognized the desirability of accompanying its decision with explicit reasons, it should rely upon reasons that functionally relate to the newly-announced rule and that reflect an awareness of the operative effects of its decision. An unusual example of the confusion which may result when a court fails to identify and apply meaningful criteria to a decision determining retroactivity *vel non* can be seen in the "extraordinary"[174] case of *Warring v. Colpoys*.[175] The case involved the interpretation of a federal contempt statute which punished misbehavior in the presence of a court "or *so near thereto* as to obstruct the administration of justice." In 1918 the Supreme Court had held in *Toledo Newspaper Co. v. United States*[176] that the statute was to be given a causal, rather than a geographic, interpretation; it was applicable, therefore, to acts done at great distances from the court so long as they had a "reasonable tendency" to obstruct justice. This interpretation prevailed until April 1941, when the Supreme Court in *Nye v. United States*[177] overruled

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1936 and at *that* time the Due Process Clause was not violated by the circumstances surrounding the making of his confession. Today, the Due Process Clause is violated." United States *ex rel.* Reck v. Ragen, 172 F. Supp. 734, 745 (N.D. Ill. 1959). The court found, however, that although the confessions by subsequent standards were coerced, this consideration was overbalanced by its belief that Reck was guilty, that evidentiary problems would preclude retrial twenty-two years after the crime, and that if released Reck was likely to commit further crimes. It held that under these circumstances due process did not require retroactive application of the coerced confession doctrines. *Id.* at 747. In addition, it cited Mr. Justice Frankfurter's opinion in *Griffin* to support its conclusion that "the Due Process Clause must . . . speak prospectively in Habeas Corpus cases." *Ibid.* The Court of Appeals affirmed upon the wholly different ground that the confessions were voluntary. United States *ex rel.* Reck v. Ragen, 274 F.2d 250, 254 (7th Cir. 1960).

On certiorari, the Supreme Court reversed in an opinion which details the evidence relating to the giving of the confession and concludes that, by the standard set in the subsequent cases, the confession was coerced. 367 U.S. 433 (1961) (two justices dissenting). No mention was made of the question of retroactivity in the majority opinion. The decision would seem to apply retroactively to Reck's confession constitutional standards that had not been enunciated when he gave it. *Cf.* Donnelly, J. Goldstein & Schwartz, Criminal Law 289-97 (1962).

174. Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law 631 (Tent. ed. 1958).

175. 122 F.2d 642 (D.C. Cir. 1941) (Vinson, J.); *cert. denied*, 314 U.S. 678 (1941).

176. 247 U.S. 402, 421 (1918).

177. 313 U.S. 33 (1941).

Toledo Newspaper and held that the words "so near thereto" must be given a solely geographical construction. In so holding, the Court set aside convictions under the statute which were based upon acts done in April 1939 at a distance of more than 100 miles from the federal courthouse. The petitioner Warring had been charged with contempt under the same federal statute for acts done at a great physical distance from the court. He was convicted on February 24, 1939—two years before *Nye* overruled the *Toledo Newspaper* doctrine and two months before the actions central to *Nye* even took place. After the decision in *Nye*, Warring sought release upon a writ of habeas corpus.

The question presented was whether upon habeas corpus *Nye* should be given retroactive application to events which occurred two years before it was announced. The district court for the District of Columbia denied the writ and Warring appealed. The Court of Appeals affirmed.

Speaking through Judge Vinson, the court considered the petition as presenting primarily the question of whether the new construction put on the contempt statute by the *Nye* decision in 1941 "took away the District Court's power to adjudge one guilty of contempt . . . ."[178] in 1939 "when in that year the Court had the power under [a different] construction."[179] What is important, the court found, was the "plane"[180] on which the change in the construction of the law stood. The Constitution stands on a higher plane than a statute, and a statute stands on a higher plane than a judicial decision. But judicial decisions interpreting an unchanged statute stand upon the same plane. To make *Nye* retroactive and thus deny the jurisdiction of the district court in 1939, the court said, would be "to place the Nye case on a higher plane than, for example, the Toledo decision"[181] and the cases which adhered to it. But *Toledo* and the subsequent cases "were on the same plane as the Nye case,"[182] since they all involved interpretation of the same unchanged statute. Inexorably, this was held to mean that retroactivity must be denied. The moving premise behind this inexorability seems to be that an overruling announcement can be retroactive only if it is on a higher plane than the decision which it is overruling; if it is merely on the same plane, it cannot lay claim to being the "basic, superior law"[183] which is a prerequisite of retroactive application.[184]

178. 122 F.2d at 645.
179. *Ibid.*
180. *Id.* at 645-47.
181. *Id.* at 646.
182. *Ibid.*
183. *Ibid.*
184. The tenor of the court's discussion is perhaps best demonstrated by its summary of the considerations which should "guide the lawmakers and the law-appliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past." The court says:

> All of the loose ends presented in this discussion on the effect of altering the law can be pretty well tied together when it is realized that law is not a pure science,

The same result would follow, under these broad rules, even if Warring had been convicted before *Nye*, having appropriately but unsuccessfully challenged *Toledo Newspaper*, and sought reversal in an appeal taken after *Nye*; the conviction would presumably have to be affirmed because the district court at the time of the conviction had the power to find Warring guilty.[185] The performance of the court in *Warring* is not typical, and need not become so, but it demonstrates the ease with which a decision on retroactivity can go grievously astray. It becomes necessary, then, to suggest factors which a court should consider in determining the issue of retroactivity.

The Purpose of the Newly Announced Rule

In deciding whether to give a new rule retroactive effect, a court to which the issue properly has been presented first should attempt to identify the purposes of the new rule, next should determine whether on balance those purposes will be served by general retroactive application of the new rule, and finally should decide whether these purposes will be promoted by retroactive application of the new rule in the particular case before it.

Many courts, for example, will be urged to apply retroactively the rule of *Mapp v. Ohio* that illegally seized evidence may not constitutionally be admitted in a state criminal proceeding. A reading of Mr. Justice Clark's majority opinion would probably suggest to a lower court that the central purpose of the *Mapp* rule is to deter police conduct which violates "the right to privacy embodied in the Fourth Amendment" and to insure that "the [constitutional] right to be secure against rude invasions of privacy by state officers" no longer remains "an empty promise."[186] The rule was not devised to require the exclusion of illegally seized evidence because of its inherent unreliability; or put another way, the *Mapp* case manifests no constitutional doubt that those convicted on the basis of illegally seized evidence had committed the acts with which they were charged. Therefore a court deciding the issue of retroactivity of the *Mapp* rule should ask: Would the release from prison of every person whose conviction was based upon illegally seized evidence have any effect in deterring unconstitutional searches? Assuming a finding of some deterrent effect, would it be substantial enough to outweigh the undesirability of reversing the convictions of many assumedly guilty prisoners? Since the

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> that law loses its vital meaning if it is not correlated to the organic society in which it lives, that law is a present and prospective force, that law needs some stability of administration, that the law is all the law there is, that law is more for the parties than for the courts, that people will rely upon and adjust their behavior in accordance with all the law be it legislative or judicial or both.

Id. at 646.

185. See HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 635 (Tent. ed. 1958). For comment on *Warring v. Colpoys*, see Note, 28 VA. L. REV. 656 (1942); Note, 26 MINN. L. REV. 658 (1942); Note, 27 IOWA L. REV. 315 (1942); Note, 16 U. CINC. L. REV. 71 (1942).

186. 367 U.S. 643, 660 (1961).

function of the rule is to deter future illegal searches by making such efforts fruitless, a court could reasonably find that application of the rule to persons convicted on the basis of past illegal searches would at best have slight deterrent effect upon future misconduct, and that whatever deterrent effect would result from retroactive application would be insufficient to warrant across-the-board release of prisoners.[187]

Cases posing the question of whether the *Mapp* rule should be made retroactive may yield the same answer—a denial of retroactivity—both to the question of across-the-board retroactive application and to the question of differentiated retroactive application on a case-by-case basis. But the two questions may require different answers when the retroactivity of a rule with a function other than deterrence is under consideration. For example, although the rule against the admission into evidence of coerced confessions [188] is usually said to be based upon a desire to deter improper police practices and brutality,[189] it also draws strength from the belief that a coerced confession will often be untruthful.[190] Thus, although one purpose of the coerced confession rule—to deter future coercion—might not be furthered either by general or selective retroactive application, another purpose of the rule—to assure that no person is punished on the basis of such inherently unreliable evidence—might well be served by either general or selective retroactive application. Because the empirical assumptions underlying this second aspect of the rule may be said to raise doubts about whether the man in prison is really the man who committed the crime, a court could reasonably find that the rule demands reexamination of at least those convictions based in substantial part upon coerced confessions.

Problems of retroactive application are not limited to the announcement of new criminal rules, however; they are also presented by the announcement of new civil rules. In the famous case of *MacPherson v. Buick Motor Co.*, for example, the court announced for the first time that an automobile manufacturer's duty to inspect for negligence—which previously extended solely

187. It might be argued, however, that the release of all prior-incarcerated prisoners would have some "shock" value in demonstrating to the police that the courts intend to stand behind the new exclusionary rule.

188. See, *e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); Watts v. Indiana, 338 U.S. 49 (1949).

189. See, *e.g.*, Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Payne v. Arkansas, 356 U.S. 560 (1958). *Cf.* Leyra v. Denno, 347 U.S. 556 (1954).

190. Professor Wigmore regarded the possibility that a confession might be untrustworthy as the only valid reason for its exclusion. 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940). See Note, 70 YALE L.J. 298 (1960).

Students of human behavior have cast considerable doubt upon the reliability of "voluntary" confessions as well. See, *e.g.*, FREUD, PSYCHOANALYSIS AND THE ASCERTAINMENT OF TRUTH IN COURTS OF LAW 23, COLLECTED WORKS, Vol. II (1956); REIK, THE COMPULSION TO CONFESS 259-62, 265-66 (1959); ALEXANDER & STAUB, THE CRIMINAL, THE JUDGE AND THE PUBLIC 94-95, 139-49 (1956).

to the dealer—would now extend all the way to the ultimate third-party purchaser. This rule may be said to embody several purposes. One purpose of the rule may have been to increase the likelihood of a plaintiff's recovery by allowing suit against the manufacturer as well as against the dealer. A second purpose of the rule may have been to place the loss resulting from the plaintiff's accident upon the person who is in the best position to distribute the cost of the accident broadly throughout the community. Still a third purpose of the rule may have been to place an affirmative and enforceable duty to inspect upon the automobile manufacturer—who is presumably in a better position to inspect than either the dealer or the purchaser—in order to decrease the frequency of accidents resulting from faulty parts.

The first purpose—increasing the likelihood of a plaintiff's recovery—would certainly be served by retroactive application, for such application would assure that more plaintiffs could sue the defendant with the deeper pocket. The second purpose—spreading the incidence of loss—would probably also be served by retroactivity, for the costs of negligent losses often can be distributed as well by charging higher prices in the future to absorb past unexpected expenses as by prospectively pricing a product so as to absorb future anticipated expenses. The third purpose—discouraging noninspection by the manufacturer—might not be furthered by retroactive application, however, because, as with *Mapp*, the new rule cannot have the desired deterrent effect upon manufacturers' conduct already completed.

A court faced with a rule with a variety of purposes, some of which will be served by retroactive application and some of which will not, may find it difficult, therefore, to decide whether on balance the dominant function of the rule will be furthered by such application.[191] All that can reasonably be asked is that a court diligently search out and identify every reasonable purpose underlying the rule and wisely employ its judicial expertise in arriving at a balanced and articulated decision.

The Element of Surprise

Even if a court determines that the purposes underlying a new rule will on balance be served by retroactive application, it must still decide whether fur-

191. This determination of the function of a new rule will continue to be an extremely difficult one. For instance, following the adoption of the twenty-first amendment, which repealed the eighteenth amendment, federal courts were asked to release upon habeas corpus prisoners serving sentences for violating the National Prohibition Act. If the purpose of the repeal was to concede that the nation had made an erroneous designation of what should be illegal, there is some justification for ordering retroactive application to persons convicted as a result of that admitted error. However, if the purpose was to change the methods of dealing with a problem which itself had changed in quality, scope, and seriousness, there is justification for limiting the repeal to prospective application only. In fact, petitions for habeas corpus were uniformly denied. See, *e.g.*, Ellerbee v. Aderhold, 5 F. Supp. 1022 (N.D. Ga. 1934), and text at notes 45-48 *supra*.

Quaere: can the purpose of a rule based upon equal protection, as, *e.g.*, the rule of Griffin v. Illinois, 351 U.S. 12 (1956), ever be served by retroactive application?

ther considerations would counsel against retroactive application. One such consideration is the degree and quality of the surprise which would result from the change in the rule of law. This consideration—often phrased in terms of fairness to the litigants—asks the question: Will a decision to make the new rule retroactive defeat reasonable expectations and justified reliances that were based on the assumption of the continued existence of the old rule? Several aspects to this problem must be dealt with.[192]

First, the element of surprise will not realistically be an operative factor in a great many cases because the parties will have acted without any knowledge at all of what the governing law was; whatever law is finally held to govern their conduct, whether it be the old rule or the new rule, will be a new rule to them.[193] This is something of what Cardozo meant when he wrote, "The

192. Because this Comment is concerned primarily with the actions of federal courts, for whom prospective overruling should be regarded as prohibited by Article III of the Constitution, it will not deal with the question of the effect which prospective overruling has upon a litigant's incentive to urge the adoption of a new rule when he knows that the benefit of the new rule, if he is successful, will be denied to him. The problem, of course, remains an important one for state courts. See Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (". . . to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellate could not in any event benefit from a reversal invalidating it." *Id.* at 28, 163 N.E.2d at 97). *Cf.* Terracciona v. Magee, 53 N.J. Super. 557, 148 A.2d 68 (1959).

The situation with respect to unfairness may be different, however, when so-called institutional litigants are involved. The interest of an institutional litigant such as an insurance company in having a rule of law changed is not limited to the specific case in which it seeks the change; rather, it extends to a whole class of cases which will arise in the future and in which it can make use of the change in law. See, *e.g.*, Mutual Life Ins. Co. v. Bryant, 296 Ky. 815, 177 S.W.2d 588 (1943), *overruling* National Life & Acc. Ins. Co. v. O'Brien's Executrix, 155 Ky. 498, 159 S.W. 1134 (1913). Similarly when a state supreme court prospectively overrules at the instance of the State a prior interpretation of a criminal statute, the State has been deprived of only a single conviction; it will be able to have the benefit of the new decision in all subsequent cases. See, *e.g.*, State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940), *overruling* City of Roswell v. Jones, 41 N.M. 258, 67 P.2d 286 (1937), and text at notes 71-76 *supra*. An organization like the National Association for the Advancement of Colored People which engages in frequent litigation in order to establish principles to be applied to a large number of similar cases in the future may also be considered to be an institutional litigant.

Because the use of prospective overruling will not deprive an institutional litigant of the substantial benefit of the new rule which it won, its use is not likely to dry up incentive to challenge established law or to discourage attempts to seek changes in the law. But in cases involving only private litigants, state courts should consider whether the example of prospective overruling will discourage others from bringing new and creative ideas and arguments to appellate courts for fear that they will be arguing the cause not for themselves but for another. See von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426-27 (1924); HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 623-25 (Tent. ed. 1958).

193. The respect due reliance under such circumstances was a particular concern of Jerome Frank. See his opinions in Commissioner v. Hall's Estate, 153 F.2d 172, 174 (2d

picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision is overruled, is for the most part a figment of excited brains."[194] And it is something of what Gray meant when he said, "Practically, in its application to actual affairs, for most of the laity, the law, except for a few crude notions of the equity involved in some of its general principles, is all ex post facto."[195] Thus, in many cases, the parties, because of their not uncommon ignorance of the legal principle that controls their actions, will not be able to make a *bona fide* claim of surprise. In these cases a sense of unfairness to the parties from retroactivity would have to stem from other considerations.

Second, the quality of the surprise which is created by a judicial decision will in part be a reflection of how consistent and settled was the law from which the new decision is departing. Sometimes the prior rule will have been embodied in a single landmark opinion which the jurisdiction has consistently adhered to and reaffirmed. To overrule such a precedent when the parties had based their conduct upon it would result in surprise. More often, however, the precedents are not in such monolithic condition. There may be two or three overlapping and partially inconsistent lines of cases in an area, each attempting to distinguish and limit to their facts the other lines. An authoritative, codifying decision primarily clarifies an uncertain area of the law—even if it specifically overrules cases in one or all of the inconsistent lines—more than it states a new rule reversing abruptly a single old rule.[196] In such circumstances, the existence of inconsistent and conflicting precedent may not provide the basis for reasonable reliance on any single precedent; a party here can do no more than act upon the best available guesses of how a court, if litigation ensues, will approach the conflict in the relevent precedent. Because the conditions for reasonable reliance are not present, the possibility of a *bona fide* claim of surprise is unlikely.

Cir. 1946) (dissenting opinion); Helvering v. Proctor, 140 F.2d 87, 89 (2d Cir. 1944) (dissenting opinion); Aero Spark Plug Co. v. B.G. Corp., 130 F.2d 290, 292, 295-98 (2d Cir. 1942) (concurring opinion); *In re* Marine Harbor Properties, Inc., 125 F.2d 296, 299 (2d Cir. 1942) (dissenting opinion). See also GRAY, THE NATURE AND SOURCES OF LAW 100 (2d ed. 1921).

194. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 122 (1921). Elsewhere Cardozo said:

> My impression is that the instances of honest reliance and genuine disappointment are rarer than they are commonly supposed to be by those who exalt the virtues of stability and certainty.

Address Before the N.Y. State Bar Association, 55 REP. N.Y. STATE BAR ASS'N 263, 295 (Jan. 22, 1932).

195. GRAY, THE NATURE AND SOURCES OF LAW 100 (2d ed. 1921).

196. Retroactive clarification of uncertain law ordinarily involves no unfairness. It is retroactive change of settled law, not retroactive settling of unsettled law, which may produce unjust results. This is why interpretative rules issued after the enactment of a new statute may normally speak as of the time of the statutory enactment. Retroactively applying an original interpretation of an unclear statute is not unfair. 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.09, at 350 (1958).

Third, it will not do for a litigant to claim surprise in cases in which the overruled decision has long been eroded by cases which have all but explicitly overruled it. Decades of cases limiting the original decision to its facts, distinguishing it from almost indistinguishable situations, declining to overrule it in apologetic tones that seem to admit that consistency would compel such an overruling—decades of cases so treating the older decision would seem to make it a weak reed upon which to rely. Parties might nevertheless claim that although they recognized that the precedent was eroded, still it was not overruled, and they had no way of knowing when the temper of the court would finally be hospitable to administering the *coup de grace* of explicit overruling. But this is the same kind of claim suggested when the parties were faced with selecting between several partially inconsistent lines of precedent. It rests not so much upon unfairness resulting from surprise as it does upon unfairness resulting from the necessity of choice in an area in which there is less certainty than one, compelled to act, would wish.

Fourth, even when the meaning of the relevant precedent in an area is fairly clear and has not been questioned or challenged by later cases, reliance upon it need not always be regarded as giving rise to a claim of surprise when the day of overruling arrives. If the precedent was made in a lower court and has never been passed upon by the highest court of a jurisdiction, reliance upon it is generally held to be similar to reliance upon an uninterpreted statute —the party relying does so at his peril.[197] "In his case," as Cardozo put it, "the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty."[198] The rule may find justification in the degree of freedom which it maintains in an appellate court when it first is asked to pass upon the question; the court is not bound by any lower court decision, no matter how old be that decision. So, too, courts may not honor reliance upon a decision—even if made by the highest court of the jurisdiction—which was rendered many years prior to dramatic changes in the field of activity to which it is relevant.[199] If the area of activity has undergone spectacular growth or contraction, parties should not be surprised if a court makes a decision recognizing these changes, rather than relying upon a case decided before any of the changes occurred. Any good lawyer, asked about the reasonableness of reliance upon the aging precedent, would have counselled that reversal was at least a good possibility.[200]

197. *Compare* State *ex rel.* Williams v. Whitman, 116 Fla. 196, 156 So. 705 (1934), *with* United States v. Calamaro, 137 F. Supp. 816 (E.D. Pa. 1956) *and* State v. Striggles, 202 Iowa 1318, 210 N.W. 137 (1926). See *In re* Luster, 12 Ill. 2d 25, 145 N.E.2d 75 (1957).

198. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148 (1921). See Evans v. Supreme Council, 223 N.Y. 497, 503, 120 N.E. 93, 97 (1918).

199. *Compare* Federal Baseball Club v. National League, 259 U.S. 200 (1922) *and* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), *with* United States v. International Boxing Club, 348 U.S. 236 (1955) *and* United States v. Shubert, 348 U.S. 222 (1955).

200. See generally Traynor, *Unjustifiable Reliance*, 42 MINN. L. REV. 11 (1957).

It has also been suggested that the conceptual division of the law into primary and remedial rights and duties may provide a further basis for identifying unfair surprise to the parties.[201] Under this analysis, primary law is defined as the principles which announce basic policies and duties to which an individual must conform; remedial law is defined as the principles which provide sanctions and methods of enforcement for failure to conform to the duties prescribed by the primary law. Although admitting the difficulty of adequately distinguishing between primary and remedial law for many purposes, advocates of this approach nonetheless find it useful in great measure. Its general thrust is that decisions which result in changes in the primary law are likely to create or destroy pre-existing duties, while decisions which result in changes in the remedial law are likely to change merely a method of enforcement, leaving the pre-existing duty in force. From this is drawn the conclusion that greater surprise is likely to result from a change in the existence or nonexistence of a duty than from a change in the method of enforcing a duty which already exists.

The *MacPherson*[202] case illustrates at once the utility and the limitations of the primary-remedial distinction as a method of identifying actual surprise. The case is usually read to announce that an automobile manufacturer has a duty to inspect for negligence which extends all the way to the ultimate purchaser of the product. Read in this way, the case imposes a duty upon the manufacturer which was not present before it was decided; he is held liable to a person when it had never been held previously that he had any duty to that person. This would appear to be a change in the primary law. Such a change would be said to raise legitimate claims against retroactivity. But the case is susceptible of another reading. Even before the decision in *MacPherson* an automobile manufacturer had a duty to dealers to inspect his cars for negligence, and dealers could enforce this duty against the manufacturer. What the court did in *MacPherson* was to extend that duty to third-party purchasers as well. Read in this way, the case did not create any new duty upon the manufacturer; it merely widened the range of persons to whom that duty was owed. This would appear to be a change in the remedial law, and such a change would be said to raise as significant a claim against retroactive application as would a change in the primary law.

A more satisfactory approach to the problem of ascertaining the degree of actual surprise created by a change in legal doctrine might acknowledge the usefulness of the primary-remedial distinction as a starting point but would proceed to inquire further into the real impact of the change upon those to whom the new rule would be applied retroactively. Thus, even if *MacPherson*

201. See generally HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tent. ed. 1958). See FHA v. The Darlington, Inc., in which Mr. Justice Frankfurter says:

> While, to be sure, differentiation between "remedy" and "right" takes us into treacherous territory, the difference is not meaningless.

358 U.S. 84, 93 (1958) (dissenting opinion).

202. 217 N.Y. 382, 111 N.E. 1050 (1916).

is read merely as effecting a remedial change, by widening the range of persons to whom the pre-existing duty was owed, the court should inquire into the real content of the pre-existing duty. For example: Was the "duty" ever enforced against the manufacturer in suits brought by dealers? Was the manufacturer aware of and insured against suits brought for violation of the duty? Only by asking questions of this kind can a judge go beyond the formalistic distinction between primary and remedial law as a method of ascertaining actual surprise.

The distinction between primary and remedial duties and rights is not wholly unrelated conceptually to the more familiar distinction between substantive and procedural duties and rights.[203] This distinction has had some viability in the related problem of when to give newly-enacted statutes retroactive application. The general rule has been framed along lines similar to those framed by the primary-remedial doctrine: if the statute is substantive, it must have prospective application only, but if it is procedural, it may have retroactive application as well. The substantive-procedural distinction raises the familiar difficulties of classification, and can work results which give rules of procedure an importance for decision which most often might be thought to be associated with substantive rules only. Statutes relating to personal disability to sue, for example, may be said to do no more than regulate the procedure for enforcing substantive rights, but when applied retroactively they may prevent a litigant from ever enforcing the right.[204] Again, newly-enacted statutes requiring the deposit of security in stockholders' derivative suits may do no more than regulate the procedure for enforcing substantive rights, but when applied to a suit in progress may result—though only procedural—in its termination.[205] A court, wishing to employ the procedural-substantive distinction as an aid to ascertaining actual surprise must realize, therefore, the limitations of the construct and must be prepared further to inquire into its relevance for the purposes at hand.

It might be argued that the availability of a declaratory judgment to determine the rights and status of individuals should be a factor in a court's consideration of whether surprise counsels that it give its decision prospective effect only. This argument would contend that since the parties could have sought a declaratory judgment and thus avoided the surprise that often accompanies a retroactive decision, it is not unfair to subject them to that surprise when they have failed to take advantage of this anticipatory procedure. This argument seems unrealistic when applied to cases in which the law seemed to be clear to the profession and the overruling decision was almost totally unexpected; if the holding of the overruled decision was clear and had not been eroded by subsequent decisions, a party would seem justified in relying upon it without first seeking the superfluous assurance of a declaratory

203. See Note, 71 YALE L.J. 344, 349 (1961).

204. See, *e.g.*, Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936). *Cf.* Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939).

205. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

judgment. To impose upon the parties the burden of the surprise resulting from a completely unexpected overruling decision, solely upon the ground that they had it within their power to avoid that surprise by seeking a declaratory judgment of the obvious, would not seem reasonable. Moreover, the argument that the availability of a declaratory judgment justifies denying relief from overruling decisions which create surprise is unrealistic for most tort cases, since the parties will not have previously considered that the acts they contemplate doing are arguably tortious, and impractical for many contract cases, since the parties under commercial pressures will not be able to abide the time required for a court to hear the case and grant a declaratory judgment. However, the argument may have some validity as to institutional litigants [206] which can reasonably expect to be involved in periodic lawsuits on given questions, such as hospitals uncertain as to the status of the charitable immunity doctrine in their jurisdiction or insurance companies uncertain as to the validity of a proposed addition to its standard policy. It may also have validity as to questions of the interpretation, construction, and constitutionality of statutes which have never been passed upon judicially.

The Administration of the Courts

In determining whether to give a retroactive reach to an overruling decision, a court may be urged to consider the effect such retroactivity will have upon the administration of the courts. It is often argued that retroactive effect should be denied to a new rule of criminal due process if a result of retroactivity will be to burden the courts with petitions for habeas corpus from incarcerated prisoners, perhaps "in numbers unknown to us."[207] According to this argument, retroactivity should be granted if at all only when there is some indication—such as statistical data of the number of imprisoned persons who could potentially take advantage of the new rule—that the volume of cases likely to result is within the ability of courts to handle with reasonable administrative efficiency and expenditure of time. In many cases such an indication may be impossible to procure; for example, no one knows the number of persons presently serving state prison sentences as the result of convictions had prior to *Mapp v. Ohio* [208] and based upon illegally-seized evidence. But whether the indication is reliably statistical or is only a sage guess, this view reflects the value judgment that granting the benefits of the new rule to those convicted under the rejected rule may not be worth the necessary administrative burden of processing the resultant load of habeas corpus petitions. Court dockets may be crowded and groaning in many parts of the nation,[209] but if other considerations counsel a court to make a new due process rule retroactive, it is difficult to see why prisoners have less of a right to be on

206. See note 192 *supra.*

207. Griffin v. Illinois, 351 U.S. 12, 25 (1956) (Frankfurter, J., concurring).

208. 367 U.S. 643 (1961). See Friendly, *Reactions of a Lawyer-Newly Become Judge,* 71 YALE L.J. 218, 236 n.105 (1961).

209. See generally ZEISEL, KALVEN, & BUCHHOLZ, DELAY IN THE COURT (1959).

these dockets than the divorce and tort claimants who largely account for the present delay in the courts. The sense of injustice which compels retroactive application of the new rule in favor of convicted prisoners ought not be defeated merely by a fear of overworking the judiciary or temporarily postponing hearings on civil cases.

The considerations of retroactivity which are based upon the administration of the courts have a second aspect. This aspect embraces the argument that many judicial decisions, if given retroactive force, could be applied fairly only upon an uneven basis, thus diminishing respect for the judicial system. Applied to the *Mapp* case, for example, this argument would find unfairness in the fact that those prisoners who could win release, assuming *Mapp* were given retroactive application, would be those fortunate enough to be able to prove that illegally-seized evidence was used against them at trial, and that such proof may today, years after trial, depend upon such fortuitous factors as whether a transcript was kept at the trial, whether the police officers who made the seizure are dead or otherwise unavailable for questioning, whether there were witnesses to the illegal seizure, whether these witnesses are available for questioning today and can remember what took place then, whether the prisoner can afford a lawyer to help him assemble what evidence remains available today on the illegality of the search. To make release dependent upon such factors, according to the logic of this argument, would be to draw arbitrary distinctions between persons similarly situated. But the same fortuitous circumstances that would come to bear upon habeas corpus proceedings also come to bear daily at trial; many persons otherwise similarly situated often receive different treatment from the law because of the fortuitous circumstance of their superior or inferior access to evidence, to competent counsel, to money, and to witnesses. While such unfairness need not be regarded as desirable, it ought to be recognized as sometimes inevitable and as inhering in every stage of the judicial process. Such disrespect for courts as results from unfairness caused by fortuitous factors is already with us in large measure; it would seem difficult to say that it will be increased significantly by the allowance of certain habeas corpus hearings in which further fortuitous unfairness may occur.

Conclusion

The use of prospective overruling by a federal court should be deemed prohibited by the case and controversy requirement of Article III of the Constitution. When a federal court overrules a prior decision and announces a new rule of law by applying it to the litigants in the case or controversy before it, it should withhold any statement as to the retroactive effect of the new rule. The question of whether the new rule should be applied retroactively should not be decided until it is presented to a court as an actual case and controversy. The decision as to retroactivity should then be made, but only after a consideration of criteria relevant to the purpose of the new rule and to the equitable and effective operation of the legal system.